No. 114.

Brf. of Guthrie, Ayer & Fentress for P. E.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
THE CITY OF CHICAGO.

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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For plaintiff in error.

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Of counsel.

WASHINGTON, October Term, 1899.

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STATEMENT OF FACTS.

This writ of error presents for review a final decree of the Supreme Court of Illinois (173 Ill. 471), which affirmed a decree of the Superior Court of Cook county dismissing the bill of complaint filed by the Illinois Central Railroad Company to obtain an injunction restraining the city of Chicago from interfering with the exercise of the right of the railroad company to fill in, for railroad purposes, certain land submerged by the shallow waters of Lake Michigan, in front of property owned by the railroad company in fee and situated between Twenty-fifth and Twenty-seventh streets in said city. The purpose of the railroad company in reclaiming the land was to erect thereon an engine house, which is necessary in the operation of its road. The railroad company asserted the right to enter upon this land by virtue of the grant contained in its charter of February 10, 1851, and the city asserted the power to deny the exercise of this right by virtue of the act of April 10, 1872, under which it was organized and subsists as a municipal

corporation, and by virtue of certain ordinances adopted under the authority of that act.

The history of the various efforts by Congress and the legislature of Illinois to secure the construction of a railroad from the Great Lakes on the north to the Gulf of Mexico on the south as an enterprise and instrumentality of great national as well as state concern and interest, and the recognized imperative public necessity and utility of such a railroad are first set out in the bill. It is shown that, prior to 1850, all these efforts had resulted in failure. In that year, Congress legislated upon the subject; and, for the purpose of inducing and aiding the construction of a railroad having a "branch of the same to Chicago, on Lake Michigan," granted to the State a right of way through the public lands, and also granted certain sections of land on each side of the road and its branches, and provided that any such railroad and branches were to "be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." Act of Congress of September 20, 1850, C. 61, 9 Stat. 466. In pursuance of this act of Congress, the Illinois Central Railroad Company was incorporated in Illinois by special charter. In and by that charter, grants were made and rights and privileges conferred; and certain duties and obligations were imposed—among others, to build the railroad within a fixed period with a branch running "into the city of Chicago, on Lake Michigan," and to pay the State a percentage of the gross receipts of the railroad. If the incorporators named did not accept the charter, then any other company approved by the State officers might do so. Act of February 10, 1851; Priv. Laws Ill. 1851, p. 61. The

incorporators named in the act duly accepted the charter (record, pp. 4–8). The provisions of the charter which are particularly material to the present inquiry are quoted in the margin for convenience of reference.[1]

The railroad company proceeded, in compliance with the requirement of its charter, to locate its road and a branch running "into the city of Chicago, on Lake Michigan," and constructed its line within the limits of the city during the year 1852 (p. 8). The bill alleges that the railroad company "constructed the line of its railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, the said southern boundary of said city, and thence its railroad was constructed into the city of Chicago

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[1] SEC. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails, from the southern terminus of the Illinois and Michigan Canal, to a point at the city of Cairo, *with a branch of the same to the city of Chicago, on Lake Michigan;* and also a branch, via the city of Galena, to a point on the Mississippi river, opposite the town of Dubuque, in the state of Iowa.

SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in "An act to provide for a general system of railroad incorporations," approved November fifth, 1849; * * *provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.

SEC. 8. * * Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city.

SEC. 10. Said corporation may construct their said road and branches over or across any stream of water, watercourse, road, highway, railroad or

through and upon the waters of Lake Michigan pursuant to an ordinance of the common council of said city" (*id.*). At this time the southern boundary of the city extended only to Twenty-second street. It was subsequently extended to Thirty-first street by the act of February 12, 1853; to Thirty-ninth street by the act of February 18, 1861, and to One Hundred and Thirty-eighth street by the annexation of the village of Hyde Park in 1889. Priv. Laws Ill. 1853, p. 609; *id.*, 1861, p. 118. The reason why the city required that the route of the railroad should be along the lake front was undoubtedly because at that time it was the most convenient and safe place for a railroad to enter the city. This ordinance, so locating the railroad on the lake front, was recognized by the Illinois legislature in 1861 and 1863 in the acts amendatory of the charter of the city. Priv. Laws, Ill., 1861, p. 136; Priv. Laws, 1863, p. 96. The charter and the portions of the acts of 1861 and 1863 referring to the ordinance are printed in the appendix to this brief.

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canal, which the route of its road shall intersect, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. * *

SEC. 15. * * *Third.*—That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof, * * with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route *into the city of Chicago, on Lake Michigan.* That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turn-outs, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date.

SEC. 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts, or income derived from said road and branches, for the six months then next preceding.

SEC. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever. * *

The ordinance required that the railroad should enter the city at or near the intersection of its then southern boundary with Lake Michigan and should follow the shore; and this route necessarily compelled the construction of the road upon piling set in the open waters of Lake Michigan at distances from the shore of from 5 feet at Park Row to 310 feet at Madison street in a depth of water from 2½ feet at Park Row to 9½ feet at Monroe street (pp. 8, 9). The city of Chicago had no power then, and has none at the present time, to grant any portion of the lands submerged under the waters of Lake Michigan. The title to these lands was solely in the State or its grantees.

In 1852, a controversy arose between the railroad company and private owners of land fronting on the lake as to the right conferred by the railroad company's charter. The railroad company desired to condemn shore property and riparian rights for railroad purposes, and asserted that it had the right to do so under section 3 of its charter. This claim was challenged by the property owners, and it was insisted that the charter did not confer the right to enter upon and appropriate any portion of the submerged lands of Lake Michigan. The decision of the Supreme Court of Illinois upon this point at the June term, 1853, as hereinafter more fully explained, was in favor of the railroad company, and *it was expressly adjudged that it had the right under its charter to enter upon and appropriate such submerged lands for railroad purposes, including an engine house. Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, 359.

The legislature of Illinois, in three instances, has recognized that the Illinois Central Railroad Company had located its track over the submerged lands of Lake Michi-

gan and had entered upon and appropriated portions thereof. This recognition will be found, first, in the act of February 18, 1861, amending the city charter, which referred to the ordinance and the Illinois Central Railroad and its location on the lake front (Priv. Laws Ill., 1861, p. 136); secondly, in the act of February 13, 1863, which also amended the charter and similarly referred to the location of the road (Priv. Laws Ill., 1863, p. 96); and, thirdly, in and by the act of April 16, 1869 (Pub. Laws Ill., 1869, p. 245), which, among other things, provided as follows:

> "SEC. 3. The right of the Illinois Central Railroad Company, *under the grant from the State in its charter*, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident *to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue*, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, *is hereby confirmed*."

The Illinois Central Railroad Company now seeks to fill in a space of about four acres lying wholly within a breakwater which was built in 1882, and which encloses shallow waters that are not navigable. It owns the adjacent shore land in fee. On the filled-in or reclaimed land, it intends to build an engine house, absolutely necessary in the operation of its road. The right to do so is denied on the ground that the charter conferred no right and contained no grant in respect of the submerged lands of the lake.

The bill of complaint sets forth the extent of the system of the Illinois Central Railroad Company, the immense expense of constructing and maintaining its trunk

lines, representing an investment of over one hundred millions, the many lines owned and controlled by the railroad company and tributary to it as the parent line, aggregating under one management more than 4,600 miles, and the fact that the city of Chicago has been made the business center and focus of all these various lines of railroad (pp. 9, 10). A map is annexed to the bill of complaint as "Exhibit E," which shows the ramifications of this immense system, one of the greatest and most important in the United States (p. 10).

Many details are averred as to the constantly increasing business of the railroad company, which is now more than twenty-fold its average yearly business from 1855 to 1861. Thus, it is shown that in 1870 the suburban trains ran south only to Oakwood, or Sixty-seventh street, in the village of Hyde Park, a distance of 8.21 miles, and that there were only five such trains daily; but that at the time of the filing of the bill in 1897 the suburban service of the railroad company extended from Randolph street to Homewood, on the main line, a distance of 23.33 miles; to South Chicago, on the branch line, a distance of 12.72 miles, and to Blue Island, on another branch line, a distance of 18.75 miles, and that 106 trains ran daily in each direction, making a total of 212 suburban trains running in and out of Randolph street station daily (pp. 10, 11), and these trains, of course, are constantly running by and in front of the premises at Twenty-seventh street, where the railroad company now proposes to locate the engine house. The bill does not show the increase of tonnage and passengers from 1852 to 1870; but it does show the increase between 1870 and 1897. The freight tonnage of the railroad in 1870 was 1,623,944 tons, whilst in 1897 it was 9,948,267 tons, an increase of over six-fold, and

the passengers carried in 1870 were 1,376,585, whilst the passengers carried in 1897 were 12,827,205, an increase of nearly ten-fold (p. 11). It is shown that the amount contributed to the state treasury, under the railroad company's charter, measured by the gross receipts of the railroad company, increased from $29,751.59 in 1855 to $625,593.30 in 1897, an increase of over twenty-fold, and that the aggregate contributions to the state treasury during that period were $16,666,859.86 (p. 12).

The bill then sets forth the facts establishing the inadequacy of the present terminal facilities of the railroad company, the necessity for more track room (p. 13), and the causes therefor, including the elevation of the tracks required by ordinances of the city of Chicago passed in May, 1897, as the incline and approach necessitated by this elevation of the tracks will require a large part of the railroad company's grounds, including the ground formerly occupied by the engine house between Fourteenth and Fifteenth streets (pp. 13, 14). It is also shown that the freight yards of the company at Randolph street are cramped and incapable of handling the business conducted by the railroad company, and that frequently fifteen hundred cars or more in number must be held out and cannot be delivered to the consignees for days at a time on account of the congested condition and small capacity of the freight yards (p. 14); that the necessity for repair shops, etc., is constantly increasing, and that immense sums have been expended lately by the railroad company in the development of its terminal facilities (*id.*). The particular necessity for the accommodation of the one hundred and thirty-five engines which are in daily use is then fully explained, and it is shown that these engines must be overhauled, fitted for work, inspected,

coaled, watered and fired daily (pp. 15, 16). In view of these facts, it cannot be disputed that increased terminal facilities are absolutely necessary. The bill alleges that the engine house and its accompanying structures are indispensable for the purposes of operating the railroad in order to meet the increased business requirements, and that, if constructed, they will be barely sufficient to accommodate the present necessities of the railroad company for taking care of the engines in daily use (pp. 16, 20). It is also shown that the railroad company owns no land unoccupied by necessary tracks and structures which could be used for this engine house; "and that in order to build said engine house and the appurtenances, it is necessary to construct the same upon land submerged by the shallow waters of Lake Michigan, at a point between 51st street and 16th street" (p. 16). The railroad company further shows that, at the point where it proposes to fill in and build the engine house, it has been the owner in fee simple of the shore or upland since 1852 (pp. 18, 19); that all the submerged land in question is and has been since 1882 enclosed by a breakwater (p. 18), and that neither the breakwater nor the filling-in will interfere with navigation (p. 20). There is, therefore, no question whatever as to the rights of riparian owners or as to substantial interference with or impairment of practical navigation involved in the case.

The bill further alleges that in 1882 the railroad company constructed, in the shallow waters of Lake Michigan at the point now in question, in front of the land owned in fee simple by it, a breakwater or bulkhead, and that the line of the bulkhead extended 200 feet into the lake from a point on the present shore line, thence southerly

a distance of 781 feet, and thence westerly to the present shore line 325 feet, as shown by the line lettered *a*, *b*, *c*, *d* on the map annexed to the bill as Exhibit D (p. 19). This breakwater entirely encloses the small space of submerged land which the railroad company now desires to fill in or reclaim. A part of the breakwater so constructed in 1882 was destroyed by storms on Lake Michigan in 1894 (pp. 19, 20), and is about to be repaired or restored. The superficial area of submerged land lying within the breakwater and the shore line of the property so owned by the railroad company is 4.48 acres, and the superficial area of the ground needed for an engine house and other necessary structures appurtenant thereto is 3.86 acres (p. 19). The breakwater does not in any way interfere with or impede the navigation of Lake Michigan; it is not located within the limits of the harbor of the city of Chicago; the exterior line of the existing breakwater runs an average distance of 250 feet from the present shore line; the depth of water does not exceed ten feet at the exterior line and shallows as it approaches the shore, and the construction of the breakwater and the filling in of the land within its limits will not substantially impair the public interests in the remaining lands and water of Lake Michigan (p. 20).

Before attempting to rebuild or repair the breakwater which was constructed in 1882 and which had been partly destroyed by storms in 1894, as aforesaid, the consent and approval of the War Department were obtained, as well as the permission of the commissioner of public works of Chicago (pp. 20, 21).

The bill then shows that the railroad company had proceeded to repair and rebuild the breakwater, and had

already filled in a large part of the space between the exterior and the interior line of piling with stone for the purpose of enabling the breakwater to withstand the force of Lake Michigan, when the work was interfered with and prevented by the officials of the city of Chicago (pp. 21, 22). The bill then prays for relief by way of injunction (p. 23), and the allegations are sufficiently specific and substantial to warrant the interposition of a court of equity to protect property rights.[1]

Although the answer denies some of the material allegations of the complaint, yet when the case came on for final hearing, it was agreed in open court by the counsel for the city "that all the allegations of fact set forth in said bill of complaint shall for the purposes of this motion be taken and considered as true, any matter or thing contained in the answer on file to the contrary notwithstanding" (p. 46); and the question now presented for adjudication is, as stated by the court below, whether, admitting the facts set out in the bill to be true, the court below erred in affirming the final decree dismissing the bill (p. 54).

There are, however, certain portions of the answer which should be referred to. The city, although admitting and averring its intention to interfere with the filling in and the construction of the engine house, nevertheless alleges that "it disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint" (p. 36). It also alleges that it is a municipal corporation organized and subsisting under and by virtue of the act of April 10, 1872, and refers to certain ordinances which it has adopted under the authority of such legislation (pp. 37, 40). These allegations are important as showing the subsequent

[1] *City Railway Co.* v. *Citizens' Railroad Co.* 166 U. S. 557, 563.

legislation relied upon by the city to support its acts. This legislation, as now given effect, constitutes, as the plaintiff in error contends, an unconstitutional impairment of the obligation of its charter contract.

The answer further pleads the judgments in the so-called Lake Front cases, *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, as estoppel and *res adjudicata*, claiming that all the questions now involved were litigated and adjudged therein.

The bill was dismissed in the Superior Court of Cook county, the court of original jurisdiction, and an appeal taken to the Supreme Court of Illinois, where the decree was affirmed. This writ of error seeks to review and reverse that decision. The opinion of the court below will be found in the record at pages 50–58. The ground of the decision was that the railroad company had no right under its charter to enter upon or appropriate any part of the submerged lands of Lake Michigan for an engine house.

The error now assigned and urged is that the court below erred in denying to the Illinois Central Railroad Company the benefit of the grant and contract contained in its charter, and gave effect to subsequent legislation impairing the obligation of that contract.

I.

The title to lands under the waters of Lake Michigan.

It is now the general rule of law in this country that the ownership of and dominion and sovereignty over lands covered by the navigable lakes, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Con-

gress to control their navigation so far as may be necessary for the regulation of commerce. The statement of the rule in these words was recently reiterated by this court in *Morris* v. *United States*, 174 U. S. 196, 236, citing *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, and *Shively* v. *Bowlby*, 152 U. S. 1; and there is no occasion for further discussion of the general subject.

It is likewise established that the extent of any title or right of a riparian owner to wharf out, fill in, or reclaim to the point of practical navigability is one of local law. *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Shively* v. *Bowlby*, 152 U. S. 1, 46; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 361. The Supreme Court of Illinois has recently decided that the proprietor of the upland has no right merely as riparian owner to wharf out or otherwise encroach upon the waters of Lake Michigan. *Revell* v. *The People*, 177 Ill. 468, 479.

The railroad company did not contend below (p. 58), and does not claim in this court, that merely as riparian owner it had the right to fill in or reclaim this submerged land for necessary railroad purposes. The allegations of the riparian ownership in the railroad company showed, however, that neither the city nor private land owners had any riparian rights to be protected or compensated for. The point in the case at bar is not as to the rights of the railroad company as riparian owner on Lake Michigan, under the rules of general or local law, which are not disputed, but is as to whether or not the right to enter upon and appropriate the land in question for necessary railroad purposes is reasonably within the fair import of the grant embodied in the charter of the Illinois Central Railroad Company. The fact that no private rights or

interests of riparian ownership are interfered with or encroached upon may well incline a court to recognize the reasonableness and propriety of the selection of such a locality for an engine house. Where, as in the case at bar, the railroad company owns the upland, the only questions are (1) as to whether the State has made any grant of the submerged land, and then (2) as to whether the grant or the proposed action thereunder will interfere with private rights, or substantially impair the interest of the public in the waters, or, in other words, interfere with practical navigability.

There can be no doubt, as matter of law, that, if the State of Illinois had passed an act specifically granting to the Illinois Central Railroad Company, as owner of the upland, the right to fill in, for railroad purposes, this small parcel of submerged land between the breakwater and the shore, no question could have been raised as to the validity of the grant. *The People* v. *Kirk*, 162 Ill. 138, 151; *Saunders* v. *N. Y. C. & H. R. R. R. Co.*, 144 N. Y. 75, 86.

The point decided below was that the charter of the Illinois Central Railroad Company did not grant to the railroad company any right whatever to enter upon or take possession of any land covered by the waters of Lake Michigan for the construction of an engine house, however necessary such a structure might be for the maintenance and operation of the railroad and the accommodation of the public, and whether or not such entry was upon shallow waters and in no degree interfered with practical navigability or the interests of the public. The same reasoning and rule would prevent the filling in for any depot, station, station grounds, turnouts or "other buildings necessary * * for the complete operation of said road,"

for these indispensable appurtenances of railroads are included in the same sentence of the charter. The decision does not purport to overrule the former adjudication in *Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, but it draws a distinction between locating the company's "line of road over the shallow waters of Lake Michigan on the line selected" and the taking of "lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter" (p. 58). Therefore, the result is, following this construction, that, although the railroad company was authorized by its charter to locate and construct its track over the submerged lands of Lake Michigan, it had and has no right to fill in or reclaim a single foot of submerged land for the purpose of building depots, stations, engine houses and the other structures which are absolutely essential in the practical operation of the railroad; although the same clause of the charter which grants land for the right of way strip also grants lands of the State outside of that strip where "necessary * * for the complete operation of said road." The grant, in so far as it affects lands, is in no sense broader in the one case than the other.

The courts of Illinois have recognized, as the now well-settled rule in that State, that a railroad company may from time to time take or acquire by grant, purchase or condemnation proceedings as much land for tracks, stations, workshops, engine houses, etc., as may be necessary for the complete operation of the railroad; that this power is not exhausted by the location or completion of the railroad; and that it is a continuing right and power to be exercised from time to time as increased facilities may be required to meet the growth and development of the cities, towns and villages along the line. *Chicago, Burl-*

ington and Quincy Railroad Co. v. *Wilson*, 17 Ill. 123, 127; *Fisher* v. *C. & S. R. R. Co.*, 104 Ill. 323, 326; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Ill. 156, 162. Therefore, the defendant cannot maintain the proposition that the location of the right of way along the margin of the lake in 1852 exhausted the power conferred in the grant. The legal position of the railroad company is exactly the same as if its system of tracks, as laid in 1852, covered, as they more than do now at Twenty-seventh street, the whole two hundred feet of right of way, and it were then seeking to build its first engine house. Its business to-day over these tracks is forty times what it was in 1855 and twenty times what it was in 1869. The court will take cognizance of the fact, for it is common knowledge, that such an immense business as that of the Illinois Central Railroad Company requires constantly increasing terminal facilities. No one can challenge the reasonableness of the proposal to build a larger engine house or the advisability of constructing it at a point where such a structure cannot interfere with practical navigability, and where it will be least annoying and offensive to the neighborhood.

The *necessity* for this engine house in the operation of the railroad cannot, as we have seen, be reasonably questioned. In view of the allegations of the bill, which the city has consented "shall be taken and considered as true," that necessity cannot be doubted. But, even if there were no such concession, the court would recognize that such an engine house must be adjacent to the tracks. Indeed, it will not be argued that the construction of this engine house *somewhere* along the line on the water front is not inevitable. Is the railroad company to be driven to the necessity of taking for this purpose three or four acres in the business

or residential district of the city, where it would disturb and annoy the community, rather than in a place east of the railroad tracks where it would annoy and disturb no one—a place which cannot be used for navigation, where no private rights are affected, and which is best fitted for the location of an engine house? The railroad company's counsel deem it inconceivable that any one, speaking and solicitous for the public welfare and convenience, will argue on behalf of the city that this engine house and the network of tracks, involving the making up and breaking up of trains, the discharge of steam and the heat, smoke, cinders and noise incident to a building holding forty locomotives, should be located *west* of the tracks. The location of the engine house at a distance from this central point would seriously inconvenience, embarrass and endanger freight and passenger traffic, and greatly increase the cost of handling trains, with all the injurious consequences attending delay and increased cost of operation. The two hundred and twelve suburban trains run continually throughout the day and most of the night. They are necessarily crowded with passengers during a few hours of morning service and a few hours of evening service, and then must run every few minutes. The tracks for such a service should be as free as practicable, and they should obviously be on the west side of the system of tracks on the lake front in order to facilitate rapid and convenient loading and unloading. The location of an engine house on the *west* would evidently interfere with this suburban service. If the engine house were located on the west of the tracks or right of way, the tracks now used for the "two hundred and twelve suburban trains running into and out of the Randolph street station daily" would have to be continually crossed,

increasing unnecessarily the danger of operation for all trains, and subjecting the great body of citizens using those trains to delay and danger, all of which can be easily and altogether avoided by locating the engine house on the *east*, or lake front, thus leaving free the tracks on the west, particularly those for suburban service. In fact, we may venture to suggest that, if the railroad company had located its engine house on the *west* of its maze or network of tracks to the inconvenience and annoyance of a residential or business neighborhood and to the immeasurable danger of its passengers, the community would have risen against such an unnecessary intrusion and danger and insisted upon a location *east* of the tracks.

Moreover, if the railroad company had not been originally compelled to build along the lake front, and had been allowed to locate its tracks in the center of the city of Chicago, the cost of construction and maintenance would not only have been immensely decreased, but the right of way would have been more valuable, the tracks more accessible, and the collection and delivery of freight and passengers more convenient. The compulsory location along the lake front was a great disadvantage, for it involved building for miles on piles and the construction of expensive breakwaters to protect the tracks and the city. As the railroad company was compelled to locate on the lake front at immense expense, surely it is eminently fair that it should be given the right to construct necessary terminal facilities without unreasonable interference on the part of the city. It would seem to be a most proper case for the application of the doctrine of equitable estoppel. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 566.

But the court below argues that the power to enter upon the waters of the lake cannot be so broad "that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with" (p. 56). No such broad pretension is made. The railroad company does not claim arbitrary power. There must be in each case a reasonable necessity for the appropriation, and the locality selected must be reasonably fit for the purpose, having regard to the public convenience. If the building of an engine house at this point would produce great private or public inconvenience, or impair the practical use of the waters of the lake, then the railroad would have to go elsewhere. But that is not pretended. So far as appears, it is the most suitable, convenient and safe place that could have been selected. The argument based on the possibility of abuse would, if sound, strike down the statutes in every State granting power to condemn for railroad or other public purposes; and it has been repeatedly argued that such power might be exercised to the great prejudice of private and public interests. But such reasoning has been refuted in too many familiar instances to have any weight now or to require refutation.

There exists no sound reason for denying the right to take or condemn a water front if needed for railroad purposes. In *Matter of N. Y. C. and H. R. R. R. Co.*, 77 N. Y. 248, 258, Miller, J., said:

> "The objection, that land under water cannot be taken, by reason of any provisions of law relating to the taking of land, or that the acquisition of land under water, with or without water front, stands upon different principles from that of ordinary land, is not, we think, available in this application. * * Such a rule would lead to great embarrassment in

> the prosecution of railroad enterprises, and would not be a practical application of the law relating to the acquisition of land in such cases. * * When, therefore, it appears that land is required * * by a railroad company for piers and wharves, which increase the facilities for transportation and benefit the public at large, no sound reason exists why it should not be used for such a purpose."

The later New York cases are *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251, 255; *Kerr* v. *W. S. R. R. Co.*, 127 N. Y. 269, 275; *N. Y. C. & H. R. R. R. Co.* v. *Aldridge*, 135 N. Y. 83, 88. See, also, *Shively* v. *Bowlby*, 152 U. S. 1, 21.

II.

THE TRUE CONSTRUCTION OF THE GRANT IN THE RAILROAD COMPANY'S CHARTER.

As the controversy involves the contract clause of the Federal Constitution, this court will regard it as not only its prerogative but its duty to inquire into the facts and determine according to its own views and upon its own responsibility the true construction of the charter of the Illinois Central Railroad Company. The ruling of the Supreme Court of Illinois in the decision under review will not, therefore, be followed unless it commends itself to this court as correct, and the construction announced in the former decision of the same court in 1853 may be adopted as the true construction of the charter. *Douglas* v. *Kentucky*, 168 U. S. 488, 500; *Chicago &c. Railroad* v. *Nebraska*, 170 U. S. 57, 68; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487. The jurisdiction of this court is sustained by the fact that the city has grounded its right of interference upon its supposed charter powers as authorized by the act of April 10, 1872 (p. 36). *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 31; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266;

City Railway Co. v. *Citizens' Railroad Co.*, 166 U. S. 557, 563.

It has always been the common understanding of lawyers that land covered by water passed by a grant of land, provided the boundaries named, or the surrounding circumstances, or long usage under the grant indicated such an intention. As Mr. Justice Gray said in *Shively* v. *Bowlby*, 152 U. S. 1, 13:

> "It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below highwater mark, *unless* either the language of the grant, or *long usage under it*, clearly indicates that such was the intention."

The railroad company contends that the grant contained in its charter of "all such lands, waters, materials and privileges belonging to the State" included lands under the waters of Lake Michigan. In support of this contention, it is shown that this was the practical construction of the charter by the railroad company and the city itself from the very beginning, as evidenced by the ordinance of 1852, under which the track was located on the lake front; that it was the authoritative construction by the highest court of the State in 1853 at the time the railroad was built; that this has been the "long usage" under the grant; and that this construction has been sanctioned and confirmed by the legislature, which, in the confirmatory act of 1869, referring to the grant of "lands" in the charter, identified them as "*submerged* or otherwise." In addition, every fair presumption should favor the railroad company in view of the provision of section 27 of its charter that "this act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever." This provision was undoubtedly inserted to pre-

vent strict construction and to assure to the incorporators a favorable construction, so as not to allow the manifest purpose and design of the act to be defeated by a strict construction and the denial of the use of means by which alone the main object could be maintained. *Moran* v. *Commissioners of Miami County*, 2 Black 722, 724.

An analysis of the section in question will be of aid in determining its true construction.

The charter, both in section 2 and in section 15, required the railroad company to build its road into the city of Chicago, on Lake Michigan, perhaps intending by the use of the words "on Lake Michigan" to have a railroad and terminus on the lake for the accommodation of the commerce of the lake. In 1851 there was no railroad leading from Chicago to the east, and all the commerce of Chicago and of the State of Illinois tributary thereto was carried to the east by vessels sailing out of the mouth of the Chicago river. There was no outer harbor at that time, nor was there any harbor at the mouth of the Calumet river at South Chicago. But whatever may be the significance and true meaning of the words "on Lake Michigan," the railroad company was bound by the act to locate its track within the city where the city authorities indicated, and the city authorities fixed a course or route nearly all of which was along the lake front, over submerged lands. This location of the route by the city's ordinance of 1852 must, in view of the subsequent statutory recognition and confirmation, be regarded as part of the charter itself. The statute prescribed a route or course "*into* the city of Chicago, on Lake Michigan," and the subsequent location by the common council was the instrumentality designated by the legislature. That route necessarily involved the entry

upon and appropriation of a part of the submerged lands of the lake. It would follow that the right to cross these waters was to be implied from the route so fixed, and that the case is within the rule decided in *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350.

The expression "lands, streams and materials *of every kind*" contained in the first sentence of section 3 is followed by the words:

> "All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes."

It may fairly be said that the word "lands" at the beginning of the first sentence of section 3 is thus explained to include land under water by the form of expression in the second sentence—viz., "all such lands, waters," etc. Because, if the word "streams" had been used for the purpose of confining or limiting the right of the railroad company to entry upon "streams," then that word would have been repeated in the sentence immediately following. Instead, however, of repeating the limited term, the legislature used the broader term "waters," which would include the waters of the lake as well as the waters of streams. Is it not reasonable, in view of all the surrounding circumstances, to conclude that the expression "all such lands, waters, materials and privileges belonging to the State" was intentionally used for the purpose of indicating that, under the word "lands," the legislature was granting the right of entry upon all the lands covered by the waters of the State which were reasonably necessary for the purposes named in the charter and did not interfere substantially with navigation? In such a case as this, is it not a fair import that the word "waters" was deliberately selected to indicate the intention of the legislature not to confine the company to streams?

The opinion below is grounded upon two definitions:[1] the one of the word "lands" and the other of the word "streams." The court reasons (pp. 57, 58) that the word "lands" cannot mean any portion of Lake Michigan, because—such is the argument—"there is a marked distinction between land and water in the definition of land"; and, secondly, because, if the legislature had intended by the use of the word "lands" to include lands covered by water, the word "streams" would not have been used, as "all streams are but lands covered by flowing water."

A.

AS TO THE DEFINITION OF "LANDS."

The court below says (p. 55):

> "The word 'lands,' as used, cannot mean any portion of Lake Michigan unless that word is given a meaning different from what is generally understood when the word has been used. Webster, in defining the word 'land,' says: 'Earth, or the solid matter which constitutes the fixed portion of the globe, in distinction from the waters, which constitute the fluid or movable part.' Under this definition there is a marked distinction between land and water, so that when the word 'land' is used it cannot be so construed as to include water."

In answer to this argument, a few definitions from lexicographers may be quoted, although, in the construction of statutes, the narrow, popular or current significance of "dry land" is not to be taken. "Where a term in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing a statute."[2]

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[1] By the settled practice in Illinois, the opinion of the court is a part of the record (Ills. Rev. Stat., ch. 37, sec. 15) and consequently may be examined by this court. *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 486; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456.

[2] Endlich Stat. Inter., § 3, citing a number of authorities which sustain the text. See, also, as to the word "land," *Brocket* v. *Ohio and Pennsylvania Railroad Co.*, 14 Pa. St. 241, 243.

The court below only quoted a part of the definition of Webster and omitted the following:

"8. (Law) Any ground, soil or earth whatsoever, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc.; real estate. Kent. Bouvier. Burrill."

Part of the definition of "land" in the Century Dictionary is as follows:

"1. The solid substance of the earth's surface; any part of the continuous surface of the solid materials constituting the body of the globe: as dry or submerged *land*. * *

"5. Ground considered as a subject of use or possession; earth; soil. In law, *land* signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or *water covered*, and everything annexed to it, whether by nature, as trees, *water*, etc."

In the Standard Dictionary the definition is:

"In law, *land* means any tract of ground whatever, together with the waters * * standing upon it, and is regarded as indefinite in extent upward and downward."

Before referring to the legal definition, it may be interesting to refer to *Revell* v. *The People*, 177 Ill. 468, in which an information was brought by the Attorney-General against Revell praying that certain piers built into Lake Michigan from his premises on the shore of Lake Michigan might be abated, etc. Mr. Justice Craig, who also delivered the opinion in the case at bar, then used the following language (p. 479):

"Upon an examination of the authorities we think it is clear that the act complained of in the information was a trespass upon the *lands* of the State; that the erection of the piers in the lake in front of appellant's premises was a purpresture. * * It is apparent from the evidence that the effect has been to add new land to his (Revell's) premises, and that the accretions resulting from the construction of the piers have extended the boundary of his premises into the lake. In other words, the erection of the piers has increased appellant's land and diminished the *land* belonging to the State. * * As

has heretofore been said, the lands covered by the waters of the lake belong to the State, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge, and when he did so an injury was inflicted on the rights of the State, which might be inquired into and abated in a court of equity on the application of the Attorney General (p. 483). * * As we understand the common law, any structure placed upon the *land* of the State below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the People. A shore owner may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, provided such structures do not interfere with navigation, but he has no right to intrude upon the *lands* of the State *unless authorized by the State* (p. 489). * * It may be conceded that under the doctrine of protection a shore owner may erect structures on his own land for protection against erosion, but as we understand the law he has no right to enter upon the *lands* of the State and erect thereon such structures, and when he undertakes to do so he is a trespasser. * * No reason occurs to us why the structure should not be abated (p. 491)."

It is submitted that it will be difficult to reconcile this use of the word "land" with the definition of the same word in the decision now under review.

In Coke on Littleton, Book 1, § 1, 4a, it is said:

"'*Terre*,' Terra, Land, in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, *waters*, marishes, furses, and heath. *Terra est nomen generallissimum, et comprehendit omnes species terræ.* * * Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe;* but the land whereupon the water floweth or standeth is demandable."

So in Blackstone's Commentaries, Book II., page 18, Coke's definition as above given, is referred to, and it is also said:

"It (land) legally includeth also all castles, houses, and other buildings: for they consist, said he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth

> therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; *but such is the language of the law:* and, therefore, I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only, * * but I must call it * * *land covered with water.* For water is a movable, wandering thing, and must of necessity continue common by the law of nature. * * But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other."

To the same effect is Cruise's Digest, Title 1, § 2.

The legal lexicographers are unanimous in holding that the definition of "land" includes lands covered by water. See Burrill, Jacobs, Black, Rapalje, Lawrence, Wharton, Anderson, Tomlinson, and Bouvier.

The decisions to the same effect are numerous.

Thus, in *Rogers* v. *Jones*, 1 Wendell 237, 255, it is said:

> "It cannot be doubted, that when a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass, if the land under water lies within the bounds of the grant."

So in *Nostrand* v. *Durland*, 21 Barb. (N. Y.) 478, 482.

> "Ordinarily, a grant of water, under any designation, does not convey the land which it covers. In order to pass the title to the land, the word 'land,' or something equivalent to it, should be inserted in the conveyance. In the case of *Rogers* v. *Jones*, (1 Wend. 237), the patent was for all the tract of *land* within certain boundaries which included the harbor of Oyster-bay, and it was therefore very properly decided that the title to the *fundus* of the waters passed to the grantee."

As Patteson, J., said in *Regina* v. *Leeds & Liverpool C. Co.*, 17 A. & E. 671, 685:

> Lands "are not the less land for being covered with water."

The doctrine that "land" includes land under water was also recognized or applied in *Beckman* v. *Kreamer*, 43 Ill. 447; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46, 56, which cites with approval *The State* v. *Pottmeyer*, 33 Ind. 402,

where the question was extensively considered; *Green* v. *Armstrong*, 1 Denio (N. Y.) 550, 554; *Canfield* v. *Ford*, 28 Barb. (N. Y.) 336, 338; *Mott* v. *Palmer*, 1 N. Y. 564, 572; and *Kingsley* v. *Holbrook*, 45 N. H. 313, 319.

B.

AS TO THE DEFINITION AND USE OF THE WORD "STREAMS."

The opinion below also relies upon the definition of a "stream," which is shown to be running water; and, as Lake Michigan has no ordinarily perceptible stream, it is said that it is not to be included in the word "stream." It is said that the use of the word "streams" shows that the legislature could not have intended, by use of the word "lands," to include lands under water; for otherwise—so the reasoning runs—it would not have used the word "streams," which "are but lands covered by flowing water" (p. 56). Of course, the court will not fail to perceive that if "streams" are but *lands* covered by flowing water, so the bed of the lake adjacent to the shore and covered by the shallow waters of the lake is but *land* covered by still water, which is what the railroad company contends.

But the word "streams" may be so explained as to show that its use is entirely consistent with the view that the word "land" included land covered by water.

At the time when the charter was granted in 1851, it was understood in many States, as it is to-day in New York, for example, and, we believe, in Illinois, that the navigable streams of the State could not be bridged, diverted, encroached upon, or crossed on culverts or piles for railroad purposes, except with the express authority of the State. *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Ill. R. Packet Co.* v. *Peoria Bridge Asso.*, 38 Ill. 467, 474; *City of Chicago* v. *McGinn*, 51 Ill. 266, 270; *McCartney*

v. *C. & E. R. R. Co.*, 112 Ill. 611, 635; *Works* v. *Junction Railroad*, 5 McLean, 425, 435. The rule was that express power to enter upon or cross or bridge navigable streams had to be included in the act of incorporation of a railroad. The numerous acts of incorporation of railroads in Illinois at or about that time would seem to indicate that this view is correct.[1] The charter of the Illinois Central Railroad Company, at the end of section 3, shows that, in the use of the word "streams," navigable streams were referred to, because the power is limited by the following:

> "*provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams;"

and section 10 requires that any stream or watercourse intersected shall be restored "to its former state or in a sufficient manner not to have impaired its usefulness." The route prescribed by the charter had to cross navigable streams, namely, the Calumet river, the Fever or Galena river, the Illinois river and the Cache river. *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350.

It is, therefore, quite apparent that in the grant of power

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[1] An act to amend an act entitled "An Act to Incorporate the Central Military Tract Railroad Company," Laws of Illinois, 1852, p. 36. An act to amend an act entitled "An Act to amend an act entitled 'An Act to Incorporate the Peoria and Oquawka Railroad Company,'" *Ibid.*, p. 193. An act to amend the charter of the Illinois River Railroad Company, Priv. Laws Illinois, 1857, Part I., p. 105. An act to incorporate the Great Northwestern Railroad Company, *Ibid.*, p. 274. An act to amend an act entitled "An Act to Construct a Railroad from Jacksonville in Morgan County to Alton in Madison County," *Ibid.*, p. 287. An act to incorporate the Galesburg and Rock Island Railroad Company, *Ibid.*, Part II., p. 1312. An act to incorporate the Galesburg and Muscatine Railroad Company, *Ibid.*, p. 1437. An act to incorporate the Illinois Farmers Railroad Company, Priv. Laws Illinois, 1859, p. 449. An act to incorporate the Monticello Railroad Company, Priv. Laws Illinois, 1861, p. 502. An act to incorporate the Illinois Farmers' Railroad Company, Priv. Laws Illinois, 1867, vol. 2, p. 737. An act to incorporate the Apple River Valley Railroad Company, Priv. Laws Illinois, 1869, vol. 2, p. 913. An act to incorporate the Belleville and O'Fallon Railroad Company, *Ibid.*, p. 936.

the word "streams" was added for the purpose of giving power in respect of navigable streams or rivers, and not in any sense or degree for the purpose of qualifying or limiting the scope of the grant of the "lands" of the State or to exclude the submerged lands of Lake Michigan.

III.

The effect of contemporaneous construction and legislative recognition or confirmation.

The statement of facts has shown the contemporaneous construction by the city authorities embodied in and evidenced by the location under the ordinance of 1852. This location along the lake front by the common council of Chicago is "indirectly the act of the State," and justly to be read as part of the charter, particularly when confirmed by subsequent judicial decision and legislation. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 563. The statement also shows an authoritative construction in 1853 by the highest court of the State, and in addition legislative recognition of the location in 1861 and 1863 and express confirmation of the grant in the act of 1869. The effect of this authoritative construction and confirmation may now be considered.

A.

Shortly after the passing of the ordinance of 1852, it became necessary for the railroad company to institute condemnation proceedings for the purpose of assessing the damages of owners of property along and adjacent to the right of way of the railroad company as located and built on the shore of the lake. A case was commenced which involved numerous parcels of land, including upland and submerged land, but the condemnation was sought by the railroad company *not for tracks or right of way, but "for*

the location thereon of their depots, station grounds, ENGINE HOUSES, *turn-tables, turn-outs, and other buildings and erections necessary for the construction and complete operation of the said road.*" The right of the railroad company under its charter "to enter upon and occupy any portion of the bed of Lake Michigan," or to encroach upon and interrupt in any manner the navigation of said lake, was directly and distinctly challenged. The lower courts refused to appoint commissioners to assess damages, and thereupon an application was made to the Supreme Court of the State for a mandamus to compel the county judge to appoint these commissioners. On the part of the property owners, it was claimed that the railroad company had no right under its charter to enter upon and occupy any portion of the bed of Lake Michigan for railroad purposes (*Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, 355). On the part of the railroad company, it was contended (p. 358):

> "1. That the bed of Lake Michigan belonged to the State of Illinois.
>
> "2. That the State had power partially to obstruct the navigation of the waters of the lake.
>
> "3. That the State had, by the express words of the charter, given the railroad company the authority to locate their road over the bed, and in the waters of the lake."

The case was decided by the Supreme Court of Illinois at the June Term, 1853. The decision of the court was to the effect (p. 359) "that the relator [the Illinois Central Railroad Company] has the right *by its charter* to locate the road over the premises in question—the city of Chicago having assented." The only consent given by the city of Chicago was contained in the ordinance of 1852 fixing the location of the *track* under section 8 of the charter.

This decision remained unchallenged as a rule of property, upon the faith of which millions have been invested in this great railroad system, for practically forty-five years, until the decision now before this court for review. This authoritative decision of the Supreme Court of Illinois is a conclusive construction of the statute, and may be regarded "as much a part of the statute as the text itself," in view of the fact that in reliance thereon the road was located and built along the lake front. *German Bank* v. *Franklin County*, 128 U. S. 526, 538; *Wade* v. *Travis County*, 174 U. S. 499, 509. But it is important to observe that this former decision has not been overruled or its soundness impugned in the case at bar. The Supreme Court of Illinois now declares (February, 1898) that the *Rucker* case involved only the right of way, and that no question was then raised or decided as to the "right of the railroad company to * * take lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter" (p. 58). This statement is incorrect. If the court will refer to the published report of the *Rucker* case and to an exemplified copy of the record in that case, now filed,[1] it will appear that the controversy

[1] The record in the *Rucker* case shows that no lots, either upland or submerged lands, were sought to be condemned by the railroad for right of way.

The railroad sought to condemn upland for "the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs and other buildings" in the following lots in the Fort Dearborn Addition to the city of Chicago:

Lots 9, 10 and the south half of Lot 8, all being part of Block 5, described on pages 6, 44, 49, 66, 71, 97, 157, 167, 187.

Lots 1 and 2 in Block 6, described on pages 7, 44, 67, 98, 105, 167, 187, 195.

The north half of Lot 5 in Block 6, described on pages 7, 45, 67, 98, 106, 168, 188, 196.

Lot 6 in Block 6, described on pages 7, 18, 45, 67, 89, 99, 107, 131, 168, 188, 198, 200.

The railroad sought to condemn the rights of the riparian owners in the

was not at all as to the right of way, but expressly involved the power of the railroad company under its charter to condemn and enter upon submerged lands and to use and appropriate the same for railroad purposes, *including engine houses.* The case therefore squarely supports the contention of the railroad company, and cannot be distinguished.

B.

The binding effect of the acts of 1861, 1863 and 1869, as constituting legislative construction, may be best stated in the language of this court in analogous cases. Thus in *The Society for the Propagation, &c.*, v. *The Town of Pawlet*, 4 Peters 480, 502, Mr. Justice Story said:

> "But in the present case, we think, there is abundant evidence in the record to establish the right of the corporation to hold the lands in controversy. In the first place, it is given to them by the royal charter of 1761, which created the town of Pawlet. Among the grantees therein named, is 'the society for the propagation of the gospel in foreign parts,' to whom one share in the township is given. This is a plain recognition, by the crown, of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed."

In *The United States* v. *Freeman*, 3 How. 556, 564, the correct rule of interpretation was stated as follows:

> "That if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. If a thing

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submerged lands for "the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs and other buildings" in the following lots in the Fort Dearborn Addition to the city of Chicago:

Lot 6 in Block 6, described on pages 7, 90, 99, 107, 131.

Lot 1 in Block 11, described on pages 8, 46, 68, 100, 108, 169, 189, 201, 202, 204, 205, 206, 207, 208.

Lot 5 in Block 11, described on pages 9, 47, 69, 101, 109, 170, 190, 210.

Lot 7 in Block 11, described on pages 10, 18, 47, 69, 91, 102, 110, 131, 170, 190, 211.

Lot 8 in Block 11, described on pages 10, 47, 49, 70, 72, 102, 111, 158, 171 172, 191, 211, 212.

contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; *and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute,* they will amount to a legislative declaration of its meaning, and *will govern* the construction of the first statute."

So in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, the court said:

"Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occuring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated."

In *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350, Mr. Justice Strong said:

"But the amendatory act of 1864 is not to be overlooked. *It is to be regarded in connection with the act of 1862, and interpreted as a part of it.* By its ninth section the company were expressly authorized to construct bridges over the Missouri, and other rivers which their road might pass in its course, for the convenience of their road; and the act declared this authority to be given to enable the company to make convenient and necessary connections with other roads. This enactment may not have been necessary. The power may have been conferred upon the Union Pacific Railroad Company by the act of 1862; and we think it was. But, whether necessary or not, it shows clearly that Congress had in view the construction of the railroad to the Iowa shore of the river. No bridge could be constructed without making use of the Iowa shore."

In *Andes* v. *Ely*, 158 U. S. 312, 322, the objection that a railroad company had not been legally incorporated was held obviated by statutes authorizing the sale of its stock.[1]

[1] See also *White Water Valley Canal Company* v. *Vallette*, 21 How. 414, 425; *Shaw* v. *Norfolk County Railroad Company*, 5 Gray 162, 180; *Whitney* v. *Union Trust Company of New York*, 65 N. Y. 576; *Shepley* v. *Atlantic & St. Lawrence R. R. Co.*, 55 Maine 395, 406; *Richards* v. *Railroad*, 44 N. H. 127, 136.

The same rule obtains in Illinois. Thus, in *McAuley* v. *C., C. & I. C. Ry. Co.*, 83 Ill. 348 (1876), it was objected that a railroad company formed by consolidation with others had no authority to construct a railroad in Chicago over the lands in question. The court said (p. 351):

> "We are of opinion that all the objections on this score are sufficiently obviated by the act of our legislature, entitled 'An act to amend the charter of the Chicago and Great Eastern Railway Company,' approved February 16, 1865. In addition to other amendments made by this act, the third section of the act provides 'that the rate of speed at which the trains and locomotives of the Chicago and Great Eastern Railway Company may be run within the limits of the city of Chicago, shall be under the control of the common council,' etc. * * This amendatory act is a legislative recognition of the existence of this consolidated company, and of the name of the consolidated company adopted by the articles of consolidation, amounting to a legislative ratification of the consolidation which had been effected; and it is also a like recognition of the right of the company to construct a railroad within the city of Chicago."

As to the effect of the confirmatory act of 1869, Mr. Justice Harlan said in the Lake Front cases (*State of Illinois* v. *Illinois Cent. R. Co.*, 33 Fed. Rep. 730, 771):

> "This confirmation covers all that was done by the railroad company prior to April 16, 1869, in the way of filling in the lake, and constructing wharves, slips, piers, tracks, warehouses, etc., between Chicago river and the north line of Randolph street. It also covers the occupancy and use by it for way-ground of the two triangular pieces of ground immediately south of Randolph street. We have already expressed the opinion that what was done in these respects by the railroad company was to be justified by its riparian ownership, by its charter, and by the city ordinances of 1855 and 1856. If, however, we should be in error in so holding, it is clear that its action, in the particulars just stated, was legalized by the confirmatory clause of section 3 of the act of 1869. If what was done by the railroad company prior to April 16, 1869, in the localities discussed in that clause, had been done under legislative authority previously conferred, the com-

pany would undoubtedly have acquired thereby property rights that could not have been taken from it except upon compensation. But subsequent legislative ratification or confirmation of what was done is equivalent to original authority. *Grenada Co. Sup'rs* v. *Brogden*, 112 U. S. 271, 5 Sup. Ct. Rep. 125; *Anderson* v. *Santa Anna*, 116 U. S. 364, 6 Sup. Ct. Rep. 413. This being so, it was beyond the power of the State, consistently with the constitution of Illinois, or the constitution of the United States, to revoke that confirmation, as was attempted to be done by the repealing act of 1873."

Even if the act of 1869 had been validly repealed, it may nevertheless be referred to as evidence of the intention of the legislature and the true meaning of the charter and the grants contained in it. It is a settled rule in the interpretation of statutes that clauses or acts which have been repealed may still be considered in construing the provisions of the same statute or statutes *in pari materia*. *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States* v. *Le Bris*, 121 U. S., 278, 280; *Viterbo* v. *Friedlander*, 120 U. S. 707, 725; *Cope* v. *Cope*, 137 U. S., 682, 688; *Groves* v. *Sentell*, 153 U. S. 465, 478.

The legislation of 1869, in the particular in which it was adjudged to be valid and effective and therefore still unrepealed, did not purport or intend to confer any increased powers upon the railroad company, but simply to recognize and confirm "the *right* of the Illinois Central railroad company under the *grant* from the State in its charter to the lands submerged or otherwise" then described. The railroad company, before the act of 1869, had appropriated, occupied and filled in submerged lands of the lake other than those involved in the Lake Front cases, and it continued to do so afterwards. Its action in this regard was under the grant in its charter, for it had no other right, and without such grant its action would have been a purpresture; and the confirmatory act

recognized and authoritatively declared that the *right* under the original *grant* in the charter was sufficiently broad to authorize an entry upon "lands submerged or otherwise."

C.

This contemporaneous construction by the city, the highest court of the State and the legislature is certainly most persuasive, and it ought to be conclusive. The importance which should be attached to contemporaneous construction is admirably stated by two of the text writers on the subject of the construction of statutes. Their statements of the law are so accurate and are so fully supported by the authorities annotated, that they may be submitted as succinctly stating the well-established rules of statutory construction.

In Maxwell on the Interpretation of Statutes, 4th ed., p. 423, the author says, speaking of the English rule:

> "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetuedo. Contemporanea exposito est optima et fortissima in lege.* Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive. But, further, the meaning publically given by contemporary, or long professional usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions; moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it. It often becomes, therefore, material to inquire what has been done under an act; this being of more or less cogency, according to circumstances, for determining the meaning given contemporaneous exposition.

Sutherland, in his work on Statutory Construction, states the rule of the American courts as follows (p. 391):

> "A contemporaneous construction is that which the statute receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction, under such circumstances, becomes established law."

The author's citation includes the following leading authorities: *U. S. Bank* v. *Halstead*, 10 Wheat. 51; *M'Keen* v. *Delancy's Lessee*, 5 Cranch 22; *Packard* v. *Richardson*, 17 Mass. 122, and *The People* v. *Loewenthal*, 93 Ill. 191. To these citations may be added: *Hahn* v. *United States*, 107 U. S. 402, 406; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621; *United States* v. *Union Pacific Railway*, 148 U. S. 562, 572.

IV.

THE EFFECT OF THE FORMER DECISION IN THE LAKE FRONT CASES. (*Illinois Central Railroad* v. *Illinois*, 33 Fed. Rep. 730; 146 U. S. 387.)

The answer of the city of Chicago in the suit at bar pleads, by way of estoppel and *res adjudicata*, the judgment in what is known as the Lake Front cases, 146 U. S. 387, and alleges "that the issues tendered in and by said bill of complaint and joined by this answer are identical with the issues made in the said Lake Front cases, so that said issues as determined as aforesaid cannot again be litigated by and between the same parties" (p. 38).

An examination of the record and decisions in the former litigation thus pleaded will show not only that

the right to appropriate or fill in the submerged lands now in question was not involved in that suit, but that the points and principles then decided support the present contention of the railroad company.

The former litigation was begun by an information or bill in equity, filed by the Attorney-General of the State of Illinois, in the name of its people, against the Illinois Central Railroad Company and the city of Chicago. The issues and the controversy as framed by the pleadings—that is, the information on behalf of the State, the cross-bill of the city, and the answers of the railroad company—related (1) to the title to submerged or reclaimed lands on the lake front and structures thereon situated between the Chicago River and Sixteenth street; (2) to the title to certain wharves and piers built out into the lake between those points; and (3) to the title to the submerged lands constituting the bed of Lake Michigan in front of property within the same boundaries, and for a distance of one mile into the lake. There can be no possible doubt upon this point if the opinion of the court in 146 U. S. 387, and of Mr. Justice Harlan in 33 Fed. Rep. 730, are examined. Of course, the record in the former case will be referred to by the court, in order to ascertain exactly what was the property then involved.

It was adjudged in the United States Circuit Court, as clearly appears from the opinion of Mr. Justice Harlan, 33 Fed. Rep. 730, (1) that the railroad company had title in fee, for railroad purposes, to all the submerged land in question which it had reclaimed from the lake, and was entitled to maintain the wharves, stations and other structures constructed upon such reclaimed lands, "which said wharves and other works so constructed,

and so far as constructed, are lawful structures and not encroachments upon the domain of the State of Illinois or upon the public right of navigation, or upon the property, interests or estate of the city of Chicago"; but it was also decided (2) that the right or title of the railroad company to the bed of the lake in front of such structures as conferred by the act of April 16, 1869, had been validly revoked and canceled by the repealing act of 1873. The railroad company was, therefore, perpetually enjoined—

> "from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan as it now exists, and as shown on said Morehouse map, east or in front of said fractional sections ten and fifteen—that is, east or in front of the grounds now occupied and used by it, between the Chicago river and the centre line of Sixteenth street, extended eastwardly, except that said company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding 100 feet in width in each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the company may be laid."

But the railroad company was not enjoined from filling in or building structures elsewhere along the lake front, south of Sixteenth street.

The act of 1869 had two distinct objects in view: one object was to confirm certain *rights* of the railroad company under the *grant* from the State in its charter; the other object was to grant to the railroad company a large tract of submerged lands in the outer harbor of Chicago in front of its track and structures. The first object was held to constitute valid and effective legislation beyond the power of any subsequent legislature to impair by repeal. The act to that extent is still in full force and effect, and the railroad company relies upon it here. The second object was held to have been effectively

canceled and defeated by the repeal of 1873 on the ground that such a grant was revocable.

Upon the first branch of the case—namely, as to the submerged land which the railroad company had entered upon and appropriated or reclaimed under the grant in its charter—the decision was in its favor; and it was adjudged that the act of 1873, in so far as it sought by repealing the act of 1869 to revoke or annul the confirmatory clause of the last-named act, was void under the constitutions of both Illinois and the United States.

From this decree in the Lake Front cases, all parties appealed, and this court affirmed the decree below with a modification relating solely to and directing an investigation for the purpose of ascertaining and determining whether the piers then in question extended beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake. The judgment of this court concluded as follows (146 U. S. 464):

> "And, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the State as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law.

"Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered."

In the Lake Front cases, there figured prominently an engine house or roundhouse of the railroad company situated at Fifteenth street, which is referred to in the bill of complaint in this case (pp. 14–16), and also the machine shop. *The engine house and machine shop had been built, as the evidence showed, on reclaimed submerged land in the space filled in east and in front of Fifteenth street. They were originally built in 1855 and rebuilt in 1860; and are the "roundhouse and machine shops" referred to in the confirmatory act of 1869.* The right to maintain and operate this engine house on this reclaimed property, and the title of the railroad company to the reclaimed land were adjudged in the Lake Front cases; yet there was absolutely no right to enter upon, appropriate, or fill in this land or build this engine house, except such as was granted and conferred by the charter of 1851. The railroad company now seeks to exercise the very same power for a similar imperative and necessary railroad purpose. We have, therefore, an express adjudication in the decision in the Lake Front cases of the right of the railroad company to do under its charter on the lake front at Fifteenth street exactly what it now seeks to do at Twenty-seventh street, a power which, of course, was not exhausted by its exercise thirty years ago. Can there be any question that the decision of the circuit court and of this court in the Lake Front cases would also have been in favor of the railroad company if the lake front south of Sixteenth street had been involved, and it had then appeared that the railroad company had filled in or was about to fill in or complete a space very much smaller than it had appropriated south of Park Row, between

Twelfth and Sixteenth streets, and that the space was absolutely necessary to the railroad company for an engine house? Would not the title and right of the railroad company have been confirmed as freely and fully as such title was confirmed to the engine house north of Fifteenth street? Indeed, there is far less objection to the filling in now proposed, because it is much less in extent than the reclaiming done in front of Twelfth to Sixteenth streets and the lake front at Twenty-seventh street constitutes no part of any present or contemplated or likely harbor for the accommodation of vessels engaged in the commerce of the lake. The filling in between Twelfth street and the south line of Block 21, involved in the Lake Front cases, was from 40 to 330 feet in width —on the average 224.24 feet—covering 12.87 acres exclusive of the piers which extended still further out into the lake 980 feet from the exterior line of filling in; and the depth of water at such line varied from zero to 10.6 feet, the average depth being 8.15 feet. The filling in now proposed is wholly within a breakwater or bulkhead constructed in 1882 in the shallow waters of Lake Michigan extending a short distance easterly from the present shore, and the space to be reclaimed is only four acres.

In the decision at circuit in the Lake Front cases Mr. Justice Harlan and Blodgett, J., distinctly recognized that the charter of the railroad company had conferred upon it a grant of power to enter upon the submerged lands of Lake Michigan. Thus, Mr. Justice Harlan said (33 Fed. Rep. 756):

> "Besides, the state—which, from the time of her admission into the Union, owned the bed of the lake thus occupied, and could lawfully permit it to be occupied for purposes not inconsistent with the public rights of navigation—had expressly

authorized the railroad company to enter upon, take possession of, and use any lands, waters, or materials belonging to her for the location of its depots, station grounds, turn-outs, engine-houses, shops, and other buildings that were necessary 'for the construction, completing, altering, maintaining, preserving, and complete operation of said road,' and *that did not interrupt navigation*. It is true that this power, in respect to lands, waters, and materials belonging to the state, within the corporate limits of a city, could not have been exerted by the company, under its charter, unless such city, by its common council, consented to the location of the road within its limits. But when such consent was given by the city of Chicago, upon the conditions specified in the ordinance of 1852,—conditions which it could lawfully impose,—the right of the railroad company, so far as the State and city were concerned, to fill in the lake to the extent prescribed by that ordinance, and to use the ground thereby made, was placed beyond question. *As to the structures erected by the company east of the exterior line designated by the ordinance of 1852, those built in 1867 may be justified*—apart from the confirmatory clauses of the act of 1869—*under the power expressly given to enter upon, take possession of, and use* (*provided navigation was not thereby interrupted*) *any lands or waters of the State that were necessary for the complete operation of the road, for the purpose designated in the charter of the company.* * * All that we intend now to decide is that, under the showing made, no basis exists for a decree declaring to be illegal the structures heretofore erected by the company east of the exterior line fixed by the ordinance of 1852; such structures appearing, under the evidence, to have been required by the growing business of the company, and therefore necessary for the 'complete operation of the road'; and it not appearing that such use of the waters of the lake interrupts navigation, or materially obstructs the use of the harbor by those engaged in commerce, or interferes with the plans devised by the United States for the improvement of that harbor. * *

"The right of way was located in the open waters of the lake. The State consented, in the charter of the company, that the bed of the lake might be used by the company for a right of way; provided the city assented to the location of the tracks within its limits. The city gave its consent by the ordinance of 1852. Nothing more is requisite to show that the tracks of the company were legally located on the line designated for a right of way. The use of such ground, in per-

petuity, as a right of way simply, does not violate any right of the State, of the city, or of the United States. *Upon the same grounds,—the power given to the company in its charter to enter upon and use any land or waters belonging to the State for a right of way of a prescribed width, and for the location of depots, and for the purpose of constructing station grounds, turn-outs, buildings, etc., necessary to the complete operation of its road, and the consent of the city, as manifested in the ordinances of 1855 and 1856,*—the occupancy of the two triangular pieces of ground south of Randolph street for the purposes of right of way must be sustained as legal. It would be waste of time to set out the evidence showing that these two pieces of ground are essential to the operation of the road."

As to the charter and the power it conferred, Blodgett, J. (dissenting opinion), said (p. 777):

"The charter of the company granted it the right to enter upon, take possession of, and use all and singular any lands, streams, and materials of every kind necessary for the location, construction, and maintenance of its road, with stations, turn-outs, side tracks, depots, shops, etc.; and all such lands, waters, materials, and privileges belonging to the State were granted to said corporation for said purposes. And under this grant the railroad company had the right to take and use this strip of submerged land, subject only to the consent of the city of Chicago. The city gave such consent by its ordinance of June 14, 1852; so that at that time the fee of this strip was in this State, subject to the right of use for railroad purposes granted to the railroad company."

In reviewing these opinions and affirming the judgment upon these points, Mr. Justice Field said (146 U. S. at p. 444):

"It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width. * * Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. *They were constructed under the authority of the law* by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use."

In view of these decisions, it cannot be doubted that the construction of the charter now contended for is that adopted and approved in the Lake Front cases, and that this former litigation, far from barring the railroad company's present claim, fully sustains it. The bulkhead or breakwater in front of the property now in question had been constructed when the Lake Front cases were commenced, and it may fairly be said that, if it had constituted an encroachment or an unlawful structure, either the State in its information, or the city of Chicago in its cross-bill would then have challenged the right of the railroad company to maintain it; but neither saw any objection to its maintenance or continuance. If it had been regarded as a purpresture or an unlawful encroachment, it would undoubtedly have been included in the suit and its abatement sought. As this was not done, and as the existing encroachment was not condemned or enjoined, it is proper to insist that the former decision adjudged that it was a lawful structure, duly constructed under the grant of power contained in the charter; and if the Lake Front cases involved this property, then it must follow that the decision was in the railroad company's favor, for the injunction did not restrain any act in respect of it. Indeed, it is practically admitted by the city that this breakwater or bulkhead is a lawful structure, for the answer states that (p. 36): "This defendant further says that it disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint;" that is to say, along the line marked *a*, *b*, *c*, *d* (p. 19). The only question, therefore, in the case now before the court is as to the right of the railroad company under its charter to fill in this small parcel of submerged land wholly

enclosed by the bulkhead of 1882 and to use the reclaimed land for an engine house, the necessity for which has not been challenged.

CONCLUSIONS.

For the reasons above discussed, it is submitted that under the true construction of the charter of February 10, 1851, the right to enter upon the submerged lands of Lake Michigan belonging to the State was granted to the Illinois Central Railroad Company; that this right is limited to parcels reasonably necessary for railroad purposes; that it must be exercised in subordination to the public right of navigation; that the construction of an engine house at or about the locality selected is necessary for the due operation of the railroad company's business; and that as the filling in of the parcel in question, situated at Twenty-seventh street in the city of Chicago, in front of the land which the railroad company owns in fee, will not impair navigation, the railroad company has the right to do so within the fair import of its charter grant. If these conclusions are sound, it will follow that the judgment below must be reversed.

Washington, D. C., October Term, 1899.

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For plaintiff in error.

BENJAMIN F. AYER,
JAMES FENTRESS,
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APPENDIX.

Act of 1851.

An Act to Incorporate the Illinois Central Railroad company. (Approved February 10, 1851.)

Whereas, in the judgment of this general assembly, the object of incorporating the Central Railroad company cannot be attained under general laws; therefore,

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, junior, Jonathan Sturges, George W. Ludlow,[1] John F. A. Sandford, Henry Grinnell, William H. Aspinwall, Leroy Wiley,[2] and Joseph W. Alsop, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate by the name and style of the "Illinois Central Railroad company," and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places whatsoever, in like manner and as fully as natural persons; may make and use a common seal, and alter or renew the same at pleasure; and by their said corporate name and style, shall be capable, in law, of contracting and being contracted with, shall be and are hereby invested with all the powers, privileges, immunities and franchises, and of acquiring, by purchase or otherwise, and of holding and conveying, real and personal estate, which may be needful to carry into effect fully the purposes and objects of this act.

Sec. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails, from the southern terminus of the Illinois and Michigan canal, to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch, via the city of Galena, to a point on the Mississippi River, opposite the town of Dubuque, in the state of Iowa.

Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops and other buildings necessary for the construction, completing,

[1] Thomas W. Ludlow, of New York.
[2] Leroy M. Wiley, of New York.

altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the state, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in "An act to provide for a general system of railroad incorporations," approved November fifth, one thousand eight hundred and forty-nine; and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided: *Provided*, that the appeal allowed by the provisions of the aforesaid act, approved the 5th of November, one thousand eight hundred and forty-nine, shall not affect the possession, by such company, of the land appraised, and when the appeal is made by others than the company, the same shall not be allowed, except on a stipulation of the party appealing that the said company may enter upon and use the lands described in the petition, for the uses and purposes in said petition set forth, upon said company giving bond and security, to be approved by the clerk of said court, that they will pay all costs and damages that may be awarded against said company, on the hearing of said appeal: *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.

SEC. 4. The capital stock of said corporation shall be one million of dollars, which may be increased, from time to time, to any sum not exceeding the entire amount expended on account of said road, divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places as may be ordered and provided by the board of directors, who shall have power to require the payment of sums subscribed by stockholders, in such manner and on such terms as they may deem proper; and on refusal or neglect on the part of stockholders, or any of them, to make payment, on the requisition of the board of directors, the shares of such delinquents may, after thirty days' public notice, be sold at public auction, under such rules as said board of directors may adopt—the surplus money, if any remains, after deducting the payments due with the interest and the necessary costs of sale, to be paid to such delinquent stockholders. The board of directors hereby appointed shall cause books to be opened for subscriptions to said stock in such manner and at such time and places as they shall direct.

SEC. 5. All the corporate powers of said company shall be vested in and be exercised by a board of directors, and such officers and agents as they shall appoint. The board of directors shall consist of not less than twelve stockholders—three of whom shall be chosen every year by the stockholders—each share having one vote, to be given in person or by proxy—and

the governor of the state of Illinois, who shall be a director *ex-officio*, perpetually, voting in person or by proxy; each director successively elected to continue in office until his successor is elected and qualified. Vacancies in the board may be filled by a vote of two thirds of the directors remaining; such appointees to continue in office until the next regular election of directors; but no person shall be so elected who shall not have been openly nominated at a meeting of the directors, at least one week before the time appointed for such election. Other officers, agents and servants, whether members of the board or otherwise, may be appointed, employed, paid and dismissed, under such rules and regulations as the board of directors may from time to time adopt.

SEC. 6. The following-named persons shall constitute the first board of directors, to wit: Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, jr., Jonathan Sturges, George W. Ludlow, John F. A. Sandford, Henry Grinnell, Joseph W. Alsop, Leroy Wiley, with the governor of the state of Illinois, for the time being, whose powers shall commence and be in full force from and after the day this act shall be accepted in the manner herein provided.

SEC. 7. The president and directors, for the time being, are hereby authorized and empowered, by themselves, their officers or agents, to execute all the powers herein granted, for the purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches; and for the transportation upon the same of persons, goods, wares and merchandise, with all such powers and authority for the control and management of the affairs of said company, as may be necessary and proper to carry into full and complete effect the meaning and intent of this act.

SEC. 8. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company: *Provided*, that the same be not repugnant to the constitution and laws of the United States, or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, by their by-laws, direct and determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine. Nothing in this act contained shall authorize said corporation to make a

location of their track within any city without the consent of the common council of said city.

SEC. 9. If any person shall carelessly, wilfully, maliciously, or wantonly delay, hinder, or obstruct the passage of any carriage on said road or branches, or shall place, or cause to be placed, any material thereon, or in any way trespass upon, spoil, injure, or destroy said road or branches, or any part thereof, or anything belonging or pertaining thereto, or employed or used in connection with its location, survey, construction, or management, all persons committing or aiding and abetting in the commission of such trespass or offense, shall forfeit and pay to the said company treble such damages as shall be proved before any court of competent jurisdiction; and further, such offenders shall be liable to indictment in the county within whose jurisdiction the offense may be committed, and to pay a fine of not less than thirty nor more than one hundred dollars, to the use of the people of the state of Illinois, or may be imprisoned in the penitentiary for a term not exceeding five years, in the discretion of the court before whom the same shall be tried.

SEC. 10. Said corporation may construct their said road and branches over or across any stream of water, water course, road, highway, railroad or canal, which the route of its road shall intersect, but the corporation shall restore the stream or water course, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. Whenever the track of said railroad shall cross a road or highway, such road or highway may be carried under or over said track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such roads or highway as may be deemed requisite by said corporation, unless the lands so taken shall be purchased, or voluntarily given for the purposes aforesaid. Compensation therefor shall be ascertained in the manner in this act provided, as nearly as may be, and duly made by said corporation to the owners and persons interested in such lands. The same when so taken or compensation made, to become a part of such intersecting road or highway, in such manner and by such tenure as the adjacent parts of the same highway may be held for highway purposes.

SEC. 11. And when the route of the said road, or either of its branches, as provided in this act, shall intersect, cross, or connect with, or run along or upon the line of any other railroad now constructing, or now in process of construction, by any other company, the company to be formed under this act shall join with such other company in making all necessary turn-outs, sidelings and switches, and other conveniences necessary to further the objects of such connection; and when the route of any other company shall be occupied as aforesaid, just compensation shall be

made to such other company for all expenditures made by them in the location of such road; and all railroads so constructed, or now in process of construction, intersected as aforesaid and connections made with the roads authorized to be built by this act, shall be made, and facilities in the transhipment of freight and passengers, and interchange of cars afforded by each, over the respective roads, upon fair and equitable terms--and in case the said companies cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the transhipment of freight and passengers, and interchange of cars, the same shall be ascertained and determined by three commissioners, one to be chosen by each of said companies, and the two so chosen to choose a third, and, in case they cannot agree upon the choice of a third person, he shall be appointed by the judge of the district court of the United States for the district of Illinois; and the decision of the three, when so chosen, shall be final: *Provided*, that this corporation shall not take and run on the road or line of any such company which is now being constructed without the consent and agreement of the company whose road or line is proposed so to be used.

SEC. 12. Every conductor, baggage master, engineer, brakeman, or other servant of said corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, the initial letters or style of the corporation. No conductor or collector without such badge shall demand or be entitled to receive from any passenger any fare, toll or ticket, or exercise any of the powers of his office, and no other of said officers or servants, without such badge, shall have any authority to meddle or interfere with any passenger, his baggage or property. In forming passenger trains, baggage, or freight, or merchandise, or lumber cars shall not be placed in rear of passenger cars; and if they, or any of them, shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement, and the conductor or engineer of the train, shall each and all be held guilty of a misdemeanor, and be punished accordingly.

SEC. 13. A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any road or street, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one half thereof to go to the informer, and the other half to the state, and to be liable for all damages which shall be sustained by any person by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each public road or street where the same is crossed by the railroad, on such elevation as not

to obstruct the travel, and to be easily seen by travelers, and on each side of said board shall be painted in capital letters, of at least the size of nine inches each, the words: "*Railroad Crossing! Look out for the cars.*" But this provision shall not apply to streets or cities, or villages, unless the corporation be required to put up such boards by the officers having charge of such streets.

SEC. 14. Said corporation shall, within a reasonable time after said road and branches shall have been located, cause to be made a map and profile thereof, and of the land taken and obtained for the use of such road and branches, and file the same in the office of the secretary of state, and also like maps of the parts thereof located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds in the county in which said parts of said road and branches shall lie.

SEC. 15. For the purpose of securing the construction of said road and branches, the right of way, and all the lands which may be selected along the lines of said road and branches, within this state, under the grant made by the government of the United States to the state of Illinois, by virtue of "An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," passed September twentieth (20,) eighteen hundred and fifty (1850;) and also the right of way which the state of Illinois has heretofore obtained along and on the line of said railroad and branches, as heretofore located and surveyed, for the uses of the same, as well as the lot of ground obtained by the state within the city of Cairo, for a depot, and all the grading, embankments, excavations, surveys, work, materials, personal property, profiles, plats, and papers, constructed, procured, furnished, and done by or in behalf of the state of Illinois, for or on account of said road and branches, also the right of way over and through lands owned by the state, are hereby ceded and granted to said corporation, for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches, as in this act provided, and in the manner following—that is to say: Immediately upon the organization of said company, and the presentation to the governor of the state of Illinois of a certificate, signed by the corporators hereinbefore named, and duly acknowledged, accepting of this act of incorporation, and certifying to the due organization of said corporation—to the subscription to the capital stock thereof by the corporators hereinbefore named and their associates, of the sum of one million of dollars, and the *bona fide* payment of twenty per cent. thereon to the treasurer of said company, verified by the affidavits of the president and treasurer of said company; (which said certificate shall be filed in the office of the secretary of state,) and after three hundred

thousand dollars of registered canal bonds, or funded internal improvement bonds of the state of Illinois, or two hundred thousand dollars in specie, or two hundred thousand dollars of six per cent. United States stock, shall have been by the said corporation deposited with the treasurer of the state of Illinois, which shall be safely preserved and kept in the treasury of said state, upon the faith of the same, to be returned to or paid over to the said corporation, upon the full completion and operation of fifty miles of said railroad, by the said corporation, according to the provisions of their said charter, the said governor of the state of Illinois shall, in his official capacity, and in behalf of the state of Illinois, and under the great seal thereof, execute and deliver to the said company a deed, in fee simple, of all said lands granted by the government of the United States, under the act of congress aforesaid, said depot lot at Cairo, right of way, grading, embankment, excavations, surveys, work, materials, profiles, plats and papers, hereinafter described and set forth, or in any way appertaining to said road and branches: *Provided*, that said company shall simultaneously with the execution of said deed by said governor, execute a deed of trust to the persons and for the purposes hereinafter named and expressed: *And provided, further*, that the deed in fee simple, to be executed by the governor as aforesaid, shall recite, at full length, the act of congress aforesaid, this act and the deed of trust aforesaid. Said deed of trust shall be executed to Morris Ketchum, John Moore and Samuel D. Lockwood, as trustee, and shall include and convey to said trustees and their successors everything included and conveyed in and by said deed in fee simple, and in addition thereto the railroad or railroads which may be built upon or along said track or tracks, line or lines, and materials for the construction thereof, with all and singular the buildings, shops, engine houses, turn-outs, stations and real estate, of every nature and description, belonging or to belong to or in anywise appertaining or to appertain to said road and branches, for the uses, trusts and purposes following, that is to say:

First. To secure and guarantee to the state of Illinois the first and prior lien on everything conveyed by said deed of trust, of every name, character and description, for security, as follows: *Firstly*—The constructing, completing and furnishing said road and branches, in the manner and time and upon conditions in this act provided. *Secondly*—For the faithful application of all money or property arising from the sale of lands, or obtained upon the faith of the same, as hereafter authorized, to the constructing, completing, equipping and furnishing said road and branches, in accordance with the terms of this act and said act of congress. *Thirdly*—The indemnification of the state of Illinois against all and every claim of the United States Government, for proceeds of sale of lands made by said company, under the provisions of this act, in the event said roads and branches shall not be completed, as required by the act of congress above referred to. *Fourthly*—

The lien hereby created shall take and have precedence of all demands, incumbrances, mortgages, bonds, judgments and decrees, against said corporation, or said property, except so far as the absolute power of selling said lands, or any portion thereof, is herein provided for: *Provided*, that in case fifty miles of the said road shall not be constructed, according to the provisions of this act, within two years, from and after the date of the organization of the company, under the same, the bonds or money herein provided to be deposited with the treasurer of the state of Illinois, shall become forfeited to and become the property of the said state, subject to the disposition of the legislature thereof.

Second. That on its organization said company may enter upon, take and receive possession of the said tracks or lines, for the purpose of surveying, locating, working and constructing said road and branches, with the right of way, land, grading, embankments, excavations, surveys, works, materials, property, profiles, plats and papers aforesaid, to be occupied, used, and employed for the purposes contemplated by this act, under whosesoever control the same may be.

Third. That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof—the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois and Michigan canal, passing not more than five miles from the north-east corner of township twenty-one north, range two east of the third principal meridian, and nowhere departing more than seventeen miles from a straight line between said city of Cairo and said southern termination of said canal, with a branch running from the last mentioned point, upon the most eligible route, to the city of Galena; thence to a point on the Mississippi river opposite the city of Dubuque, in the state of Iowa; with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan. That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turn-outs, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date. Said roads to be made equal, in all respects, to the road leading from Boston to Albany, usually known as the Great Western Railway, with such improvements as experience shall have shown to be expedient—the central or main line to be first commenced, and be continued to completion.

Fourth. A portion of said lands so conveyed to said trustees, not exceeding one fourth part thereof in value, to be designated by said company, shall be held by said trustees, free from all incumbrances, for purposes of sale, from time to time, on the requisition of said company, for the

purpose of raising funds for the payment of interest on loans, in case of deficiency from other sources, and for such expenditures as the exigencies of the business of the company may require: *Provided*, that no portion of said fourth part of said lands shall be sold until said road and branches shall have been surveyed and located, and the work actually commenced on the main road: *Provided, further*, that no portion of said lands so held by the said trustees, free from all incumbrance for said purposes, shall be sold or offered for sale until the said trustees shall be satisfied that a sum of money has been actually expended upon the construction of a section of at least fifty miles of said road, adjacent to said lands, equal in amount to the sum of money to be raised from the sale of such portion of said lands, or until a section of at least fifty miles of said road, adjacent to said lands, shall have been completed—when the lands on said section will be sold—and so on till the said road and branches shall be completed.

Fifth. For the purpose of raising funds from time to time, for the construction and completion of said road and branches, and the purchase of iron and other materials to be used thereon, said company may issue its bonds, countersigned by the said trustees, in sums of not less than five hundred nor more than one thousand dollars each, at rates of interest not higher than seven per cent. per annum, payable semi-annually; the principal of said bonds payable in the year one thousand eight hundred and seventy-five, or sooner, at the pleasure of the company, at such place as it shall designate. The payment of said bonds shall be secured by the deed of trust aforesaid, of said lands, roads, and materials, as hereinbefore provided; subject, nevertheless, to the prior lien of the state upon said lands and property hereinbefore provided for; which said prior lien shall be referred to and recited in said bonds, so to be issued by said company: *Provided*, that the faith of the state is in no wise pledged for the redemption of said bonds to any extent.

SEC. 16. When the said company shall have completed, and put in running order, fifty miles of said road, the said trustees, on the requisition of said company, may proceed to sell the lands lying along and adjacent to such section so completed, (and not reserved free from all incumbrance as aforesaid,) and in such manner as the company may direct. Said lands shall be sold for cash in hand, or the bonds of said company at par. All bonds received on such sales shall be cancelled by said trustees and delivered to said company. The trustees shall invest all money received on such sales in the bonds of the company, which shall be, in like manner, canceled and returned. On canceling said bonds, and before returning them to the company, said trustees shall make a brief memorandum on each bond, specifying for or on what particular tract or tracts of land the same was received. On making such sales, and receiving the price of such lands in money or bonds as aforesaid, said trustees shall convey such tracts, by an

absolute title in *fee simple*, to the purchasers; which conveyance shall operate as a release or an acquittance of the particular tract or tracts so sold, from all liability or incumbrance on account of said bonds, so specified in the preceding section, so as to vest in the purchasers a complete and indefeasible title. Before any sales shall be made of any of said lands, the said trustees shall make a complete record, describing each and every tract of land selected under said act of congress, a copy of which record shall be filed in the office of the auditor of this state, and as sales of land are made, as provided herein, from time to time, the said trustees shall make and keep a record as aforesaid of every and each tract of land so sold, together with the name of the person to whom, and the price for which the same was sold. A copy of which record of sales shall be filed in said auditor's office semi-annually.

SEC. 17. The trustees shall not, at any time during the construction of said road and branches, sell or dispose of lands to an amount exceeding the sum which shall then have actually been expended upon the said work, but may, at the request of the company, sell as the work progresses, so as to meet expenditures actually made on the sections of road completed, as far as the receipts from said sales may go toward their liquidation. And all lands remaining unsold at the expiration of ten years after the completion of said road and branches, shall be offered at public sale, annually, until the whole is disposed of, and the avails applied to the payment of the outstanding bonds of the company as aforesaid; or, if no such bonds be outstanding, said avails shall be paid to said company.

SEC. 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the state of Illinois, five per centum on the gross or total proceeds, receipts, or income derived from said road and branches, for the six months then next preceding. The first payment of such per-centage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches, six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the state of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the state of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. And if any person so examined by the governor, or other authority, shall,

knowingly and wilfully, swear falsely, or if the officers making such affidavits shall, knowingly and wilfully, swear falsely, every such person shall be subject to the pains and penalties of perjury.

SEC. 19. The selection of lands provided for in the act of congress making the grant hereinbefore specified, shall be made by said company, or such agents as it may designate, under the appointment of the governor of this state, subject to the approval in said act specified. Said selection, as well as the survey, location, and completion of said road and branches, and the compensation of such trustees, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the state of Illinois. Said road and branches to be free for the use of the United States, and to be employed by the post office department, as provided in said act of congress.

SEC. 20. In case of the death, resignation, removal, or inability to act, of either or all of said trustees, the vacancy, or vacancies shall be filled by the governor of the state of Illinois and said company, alternately; the governor filling the first vacancy that may occur.

SEC. 21. The corporate authorities of any city or cities on the line of said road or branches, or at either terminus thereof, or any owner or owners of property in any such city, or any association of citizens duly authorized by any such corporation, shall have power to lay down or construct a track or railroad along any of the streets of any such cities, for the purpose of conveying property to and from said railroad, which may be consigned to any of the warehousemen, in any of said cities, that said track or railroad (under the direction of said company,) may intersect the track of said railroad company at or near the main depot in said cities, respectively; and said company shall, at all times, permit the owners or consignees of property in such cities to take the cars containing the property to them consigned, to their respective warehouses upon said track: *Provided*, that any car so taken shall be returned without any unnecessary delay: *And provided, further*, that whenever it shall be necessary, for the convenience of the public, or persons receiving or sending property by said railroad, the said company shall permit side tracks to intersect their main road at any depot on or along the line of said road; and that such persons shall be entitled to have any property taken from such side tracks, under the directions and regulations of said company, without unreasonable delay; and for the non-performance by said company of any act of this proviso required to be done, said company shall forfeit and pay to the party aggrieved the sum of fifty dollars, in each case, to be recovered in an action of debt, before any justice of the peace, or any court having jurisdiction thereof.

SEC. 22. The lands selected under said act of congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state, until sold and conveyed by said corporation or trustees, and

the other stock, property and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of said six years, the stock, property and assets belonging to said company shall be listed by the president, secretary or other officer, with the auditor of state, and an annual tax for state purposes shall be assessed by the auditor upon all property and assets of every name, kind and description belonging to said corporation. Whenever the taxes levied for state purposes shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts or income aforesaid, shall be paid into the state treasury in money, and applied to the payment of interest-paying state indebtedness, until the extinction thereof: *Provided*, In case the five per cent. provided to be paid into the state treasury, and the state taxes to be paid by the corporation, do not amount to seven per cent. of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation.

SEC. 23. This act, and all grants herein contained, shall cease and be void, unless accepted by said company within sixty day after the passage of this act; and immediately on such acceptance, made in the manner above provided, the deed in fee simple, and the deed of trust aforesaid, shall be made as above provided. All the grants herein contained shall cease and be void unless said road and branches be surveyed and located, and work on the main trunk actually begun before the first day of January, 1852.

SEC. 24. The state shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues, which may accrue to the state from said corporation, as herein provided; which lien of the state shall take precedence of all demands, judgments or decrees against said corporation.

SEC. 25. That each and every person, who, on the twentieth day of September, one thousand eight hundred and fifty, was the owner of any improvements made previous to that date, on any lot of land conveyed to the said company, and who became such owner with a view to a residence on, or occupation of such lot of land for agricultural purposes, shall have the right to purchase, at not exceeding two dollars and fifty cents per acre, a quantity of the lot so owned, to be bounded by the legal subdivisions, not exceeding one quarter section, to consist of the quarter-quarter, half-quarter, and quarter section, which will include the improvement aforesaid: *Provided*, that any person claiming the right to purchase, under the provisions of this

act, shall, within three months from the date of selecting the lands, file in the clerk's office of the circuit court of the county in which the land claimed is situated, a notice to the said trustees and corporation of his, her or their claims, describing the land by its numbers, accompanied with an affidavit stating the date and object of the improvement, the time and manner when and how he, she or they, became the owner thereof, and also the affidavits of at least two residents of the county, proving the facts in relation to such claim: *And provided, further*, that the right of way upon and across any lot of land sold under the provisions of this section, not exceeding two hundred feet in width, shall be reserved and retained for the passage of the road, as the same may be located and constructed, and any person claiming the right to purchase as aforesaid, shall, within twelve months from the date of commencing the work on the road within the county in which the land is situated, pay the said trustees or the corporation the consideration money for the land claimed; which payment shall entitle him, her or them, to a deed conveying an estate in fee; but in case of failure to make such payment, the right to make the purchase shall cease. When two or more persons claim the right to purchase the same lot of land, and file the proof of ownership as herein required, the person proving the first residence by himself, or those under whom he claims the improvement, shall have the right to make the purchase, but no sale or conveyance of any lot of land under the provisions of this section, shall affect the rights or equities of parties claiming the same, as between each other.

SEC. 26. In case the persons incorporated by this act shall fail or neglect to accept the provisions of the same, and comply with its conditions within the time, and in the manner herein prescribed, then the same may be accepted by any other company which shall be approved of by the governor, auditor and treasurer of this state; who, upon complying with the terms and conditions of this act, shall be vested with all the rights, powers and immunities conferred upon the corporators herein named, and shall be subject to all the liabilities in the said act set forth, in as full, ample and complete a manner as if their names were inserted as corporators in this act.

SEC. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared, in all courts and places whatsoever, and shall be in force from and after its passage.

ACT OF 1861.

AN ACT to amend "An act to amend the act entitled, 'an act to reduce the law incorporating the city of Chicago and the several acts amendatory thereof into one act, and to amend the same,' approved February 14, 1851, and to reduce the several acts amendatory of said act into one act, and to amend the act entitled 'an act to incorporate the Chicago City Hydraulic Company,' approved February 15, 1851, and to reduce

the several acts amendatory of said last mentioned acts into one act, and to amend the act entitled, 'an act to incorporate a board of Sewerage Commissioners for the City of Chicago,'" approved February 14, 1855. (Approved February 18, 1861.)

* * * * * *

SEC. 64. No encroachment shall be made upon the land or water west of a line mentioned in the second section of an ordinance concerning the Illinois Central Railroad (which line is "not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto,") by any railroad company; nor shall any cars, locomotives, engines, machines, or other things belonging to any railroad or transportation company, be permitted to occupy the same, nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue; nor shall the city council ever allow any encroachments west of the line above described. And any person being the owner of or interested in any lot or part of a lot fronting on Michigan avenue, shall have the right to enjoin said company, and all other persons and corporations from any violations of the provisions of this section or of said ordinance, and, by bill or petition, in chancery, in his or their own name, or otherwise, enforce the provisions of said ordinance and of this section, and recover such damages, for any such encroachments or violation as the court shall deem just—the state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant. Neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue.

ACT OF 1863.

AN ACT to reduce the Charter of the City of Chicago and the several acts amendatory thereof into one act, and to revise the same. (Approved February 13, 1863.)

* * * * * *

CHAP. VII., SEC. 43. (This section is identical with section 64 of the act amendatory of city charter, approved February 18, 1861, *supra*, except that after the words "nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue," the words, "south of Madison street," are added.)

ACT OF 1869.

An Act in relation to a portion of the submerged lands and lake park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago. (Passed over objections April 16, 1869.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, that all right, title and interest of the State of Illinois in and to so much of fractional section fifteen (15), township thirty-nine (39), range fourteen (14), east of the third (3d) principal meridian, in the city of Chicago, County of Cook, and State of Illinois, as is situated east of Michigan avenue and north of Park Row, and south of the south line of Monroe street, and west of a line running parallel with, and four hundred feet east of, the west line of said Michigan avenue—being a strip of land four hundred feet in width, including said avenue, along the shore of lake Michigan, and partially submerged by the waters of said lake—are hereby granted, in fee, to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety (90) feet in width, in such manner and upon such terms as the Common Council of said city may, by ordinance, provide: *Provided*, that no sale or conveyance of said property or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the Aldermen elect.

SEC. 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the "Park Fund" of the said city of Chicago, and said fund shall be equitably distributed, by the Common Council, between the South Division, the West Division, and the North Division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement, in each of said divisions, or in the vicinity thereof, of a public park, or parks, and for no other purpose whatsoever.

SEC. 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois, in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly, and a line extended eastward from the south line of lot twenty-one, south of and near to the round house and machine shops of said company, in the South Division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: *Provided*, however, that the fee to said lands shall be held

by said company in perpetuity and that the said company shall not have power to grant, sell or convey the fee to the same, and that all gross receipts from use, profits, leases or otherwise of said lands or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company upon which said company shall forever pay into the State Treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And Provided, also*, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: *And, provided, further*, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate, or of such occupancy, be exempt from municipal or other taxation.

SEC. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten (10) and fifteen (15), in said township thirty-nine (39), as aforesaid, are hereby granted, in fee, to the Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot and for such other purposes as the business of said companies may require: *Provided*, that upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid, in conformity with the requirements of said charter.

SEC. 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington & Quincy, and Michigan Central Railroad companies of the land as aforesaid, said companies are hereby required to pay to said city of Chicago, the sum of eight hundred thousand dollars, to be paid in the following manner, viz: Two hundred thousand dollars within three months from and after the passage of this act, two hundred thousand dollars within six months from and after the passage of this act, two hundred thousand dollars within nine months from and after the passage of this act,

two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the park fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

SEC. 6. The Common Council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon, or otherwise; and in case the said Common Council shall neglect or refuse thus to quitclaim and release to the said companies as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

SEC. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the Treasury of the State of Illinois the per centum on the gross or total proceeds, receipts or income derived from said road and branches stipulated in its charter and also the per centum on the gross receipts of said company reserved in this act.

SEC. 8. This act shall be a public act, and in force from and after its passage.

No. 114.

Brief of Ayer, Guthrie & Fentress for P. E.

Court U. S.
FILED
OCT 26 1899
JAMES H. MCKENNEY,

Filed Oct. 26, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE CITY OF CHICAGO, *Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

BENJAMIN F. AYER,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
Of Counsel.

BARNARD & MILLER, PRINT.

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Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

By an act of Congress approved September 20, 1850 (9 U. S. Stat., 466), the right of way through the public lands was granted to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal (at La Salle) to a point at or near the junction of the Ohio and Mississippi rivers, "with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said State, to Dubuque, in the State of Iowa."

A large grant of public lands was made in the act in aid of the construction of the road; and it was provided that the construction of the main line should be commenced at its northern terminus and at its southern terminus simultaneously, and "continued from each of said points until completed, when said branch roads shall be constructed, according to the survey and location thereof." It was also provided, that if the railroad should not be completed within ten years, the State should be bound to pay to the United States the amount which might be received upon the sale of any part of the lands by the State, and the title to the residue should re-invest in the United States.

By an act of the State Legislature, approved February 17, 1851 (Illinois Laws, 1851, pp. 192-3), the above mentioned

act of Congress was accepted, and all conditions expressed in the act were formally "agreed to and made obligatory upon the State of Illinois."

It is a well known historical fact that for a number of years prior to 1850 the construction of a railroad from Cairo to Galena had been considered by the legislature and people of Illinois as an object of great public importance. In February, 1837, an act was passed by the legislature providing for the building of the road by the State, and the sum of $3,500,000 was appropriated for that purpose. The money was to be procured by the sale of State bonds. (Ills. Laws, 1837, p. 121.) Bonds to a large amount were actually issued and sold by the State, and with the moneys thus borrowed the State entered upon the construction of an extensive system of internal improvements. The financial panic which swept over the country in 1837 and 1838 brought these enterprises to an abrupt close. The borrowed money was exhausted and the State was compelled to suspend the payment of interest on the public debt. The bonds of the State were discredited, and it was not until 1850 that the revenues were found to be sufficient to meet the current demands upon the treasury for ordinary State expenses.

The first substantial hope of relief from that depressed condition of the State finances came from the passage of the above mentioned act of Congress. In the annual message of Governor French to the legislature on the sixth of January, 1851, it is said:

> "The very liberal grant of lands by the general government to aid in the construction of great leading public works through the State, has given a new and vigorous impulse to the hopes and expectations of the friends of these enterprises. The immense influence which this magnificent grant, if judiciously managed, may be made to exert upon the present condition and future destiny of the State, can hardly be overrated."

In another paragraph relating to the same subject, the governor goes on to say:

"The prominent object to be kept in view is the completion of the contemplated works; and to render it certain that these shall be undertaken and finished, liberal terms in the disposition of the granted lands must be tendered to those willing to undertake them. * * It is not presumed that the State will engage, in any form, directly, in the enterprise, and that whatever connection she may have with it, if any, will be in an indirect way. * * Keeping in view, then, the important object to be gained, the early construction of the contemplated works, while on guard against mere adventurers, in whose hands the means of construction or the project itself might be endangered, it may be proper to observe that to secure this object, liberal offers should be made to induce capitalists to engage in the enterprise."

The force of these suggestions will be appreciated when it is borne in mind that the proposed railroad was more than 700 miles long, and that for the greater part of its course it would traverse a new and unsettled country. The granted lands, with other lands adjacent, had been in the market for twenty-five years at the minimum government price of a dollar and a quarter an acre, and there were few purchasers. The road would cost many millions of dollars and must be completed within ten years. The State had no money, and its credit was exhausted. The only resource of the State was to create a corporation composed of non-resident capitalists, who had the ability to raise the necessary money and would be willing to assume the risk and undertake the work. The Illinois Central Railroad Company was incorporated for that purpose at that session of the legislature. Provision was made for a large permanent revenue to the State from the earnings of the road. It was provided in the charter that the State should be paid annually, in perpetuity, a sum equal to not less than seven per cent. of the gross earnings of the railway. The direct pecuniary benefit to be derived from this source was expected to be large, and these expectations have been fully realized. The gross sum received by the State out of the earnings of the road down to April 30, 1899, was

$17, 652,930.21. For the six years ending April 30, 1899, these contributions to the revenues of the State amounted to $3,856,929.35, or an average of $642,821.56 per year.

The act to incorporate the Illinois Central Railroad Company, approved February 10, 1851 (Priv. Laws of Ills., 1851, p. 61), confers power (Sec. 2), "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to the City of Cairo, with a branch of the same to the City of Chicago, on Lake Michigan; and also a branch *via* the City of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa."

By the seventh section, the president and directors were empowered "to execute all the powers herein granted for the purpose of surveying, locating, constructing, altering, maintaining and operating said road and branches." In the fifteenth section, the company was required (paragraph third) to "proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof"; and it was provided that the Chicago branch should diverge from the main line at a point not farther north than the parallel of 39½ degrees north latitude, and run "on the most eligible route *into the City of Chicago, on Lake Michigan.*" The central road or main line was required to be completed, with at least one track, "with the necessary turn-outs, stations, equipments and furnishings," within four years, and the branches within six years.

By the same section (15), the right of way and all the lands included in the grant made to the State by the aforesaid act of Congress were "ceded and granted to said corporation"; but a paramount lien on the road and branches and all the granted lands was retained by the State to secure the completion of the work within the time prescribed, and to indemnify the State against any and every claim of the United States for proceeds of sale of lands under the provisions of that act, in case the

road and branches should not be completed as required in said act.

The act of incorporation also contained this additional grant:

> "SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular, *any lands, streams and materials of every kind*, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to provide for a general system of railroad corporations,' approved November fifth, one thousand eight hundred and forty-nine."

The eighth section contains this provision:

> "Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the Common Council of said city."

The last section of the charter (Sec. 27) declares, that

> "this act shall be deemed a public act, *and shall be favorably construed for all purposes therein expressed and declared in all courts and places whatsoever.*"

The railroad was located within the City of Chicago in 1852 (in accordance with the provisions of a city ordinance), for a short distance, along the shore of Lake Michigan, and for the rest of the way, across the open waters of the lake in front of the shore.

In 1882 the company constructed a breakwater in the shal-

low waters of the lake in front of its own land upon the shore between the foot of 25th street and the foot of 27th street. In 1897 it became necessary to construct an engine-house on a portion of the land between that breakwater and the shore, and to fill in, for that purpose, a part of the inclosed area. The breakwater had been injured by storms and partially destroyed, and in order not to infringe any rule or regulation of the United States affecting navigation, application was made to the Secretary of War for permission to repair and rebuild it. Consent was granted in the following terms:

"WAR DEPARTMENT, WASHINGTON, AUGUST 14, 1897.

"SIR: I have the honor to acknowledge the receipt of your letter of 6th instant, requesting permission to repair certain piers, belonging to your company, in the vicinity of 25th and 27th streets, Chicago, Illinois.

"In reply I beg to inform you that the local engineer officer, to whom your communication was referred, having reported that the proposed work will in no way affect the general navigation of Lake Michigan or of Chicago harbor, the War Department will interpose no objection thereto.

"Very Respectfully,

"G. L. MEIKLEJOHN,

"Acting Secretary of War.

"J. T. HARAHAN, ESQ.,

"2nd Vice-President Illinois Central Railroad Company, Chicago, Illinois."

Preparation was then made by the company for repairing and rebuilding the breakwater and filling in the land needed for the construction of the engine-house, but the company was forcibly prevented by the police force of the city, acting under the orders and direction of the mayor, from going on with the work. The object of the bill filed in this case was to procure an injunction restraining the city, its officers, attorneys and agents, from further preventing or in anywise interfering with the work of completing the breakwater and filling in, reclaiming and using the submerged land inside of that structure for the purpose of constructing an engine-house thereon.

The railroad company asserts that by virtue of the grant made by the State to the company in section 3 of its charter, it had the lawful right to enter upon and take possession of the land in question, belonging to the State, for the purpose that has been mentioned, and that the City of Chicago, which is a governmental agency created by the State for civil or political purposes, has by its forcible interference arbitrarily deprived the company of its property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. It is also alleged that this forcible interference was made under color of a pretended police ordinance of the city, which, in the application made of it, impairs the obligation of the contract between the State and the company contained in the company's charter.

It is not denied by the city that the company seeks to enter upon and take possession of the land in question for a legitimate and necessary purpose; nor is it pretended that the reclamation of the land from the lake would be any impairment of the public right of navigation. The position taken by the city in its answer is, that the railroad company has no right to take possession of any land of the State covered by the waters of the lake, whether shallow or navigable, for any purpose whatever, and it justifies the forcible interference complained of on the ground that it is a municipal corporation organized under an act of the General Assembly of the State of Illinois entitled, "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and the several acts amendatory thereof; and that it is thereby "charged with the duty and power of protecting and regulating the harbor and shore of Lake Michigan within its corporate limits, and exercises to that end *the police power of the State of Illinois.*" It is alleged in the answer that "in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof." It is also alleged, that "it is made the duty of the City of Chicago

by its charter to regulate the police of said city, and pass and enforce all necessary police ordinances."

Several ordinances established by the city council, relied upon as a justification of the acts complained of, are set out in the answer, containing provisions to the effect, that the harbor master and assistant harbor masters "shall have all the power and authority of police officers under the laws of the State and the ordinances of the City of Chicago"; that all the waters of the lake within three miles of the shore, between the north and south lines of the city, "shall be a portion of the harbor of the City of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations" provided by the city council; that no person or persons shall cause any piles, stone, timbers or earth to be driven or placed in the harbor without permission of the commissioner of public works, and that any one violating this provision "shall, on conviction thereof, be fined not less than twenty-five dollars nor more than fifty dollars for the first offense, and not more than seventy-five dollars for each and every subsequent offense."

The case was decided in the State court adversely to the railroad company. It was held that the grant in section 3 of the charter "did not include lands covered by the waters of Lake Michigan"; that the word "lands" in that section meant only dry land, constituting part of the fixed or solid portion of the earth, and (adopting that construction) that the legislature had conferrred no authority upon the railroad company to enter upon and appropriate to its own use for railroad purposes the premises in question.

It is clear that this court is not required to accept the construction thus put upon the grant by the State court as authoritative. This court will determine for itself whether the grant may not include the land of the State which in this case had been taken possession of by the railroad company, and of the use of which it has been forcibly deprived. It is respectfully insisted on behalf of the railroad company that the decision of the State court is manifestly erroneous, and it is the object of

this brief to point out the reasons for that conclusion. We contend and will endeavor to show:

1. That the narrow and restricted interpretation given to the word "lands," is contrary to well and long settled legal principles.

2. That the decision is contrary to the interpretation put upon the statute at the time of its enactment, and ever since adhered to by those whose duties it has been to construe, execute and apply it.

3. That it is contrary to the interpretation put upon the statute by the Supreme Court of Illinois in 1853, immediately after the railroad was originally located.

4. That it is contrary to the construction adopted and acted upon by the legislature of Illinois, in a public act passed in 1869.

5. That it is contrary to the decision of the Circuit Court of the United States for the Northern District of Illinois, in a closely contested and thoroughly considered case adjudicated in 1888, which decision was afterwards affirmed by the Supreme Court of the United States.

I. It is a sound rule, which has been recognized as such by this court, and the doctrine is generally accepted, that whenever a legislature in this country "use a term, without defining it, which is well known in English law, and there has been a definite, appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law." (*McCool* v. *Smith*, 1 Black, 459.)

And the Supreme Court of Illinois have repeatedly announced the same doctrine. (*Bedell* v. *Janney*, 4 Gilm., 193, 205; *Steere* v. *Brownell*, 124 Ills., 27, 31.)

The word "land" or "lands" is a word of that description. It is a word of very extensive signification, and comprehends all real property whatsoever.

> "It includes," says Blackstone, "not only the face of the earth, but everything under it or over it. And, therefore, if a man grants all his lands, he grants thereby all his mines of

metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing; but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum,* everything terrestrial will pass." (2 Black. Com., 18.)

The rule is elementary, that a grant of "land," unless restrained by other words, will carry everything of a permanent nature which lies within the bounds of the grant. By the simple word "land" everything terrestrial passes.

"Land comprehends any ground, soil or earth, and whatever is contained within it or beneath its surface. But a grant of water does not include land, except in the case of salt pits or springs. Property in respect of water is predicated only of its use, except as connected with land." (1 Washburne on Real Prop., pp. 3, 4.)

"Real property is corporeal or incorporeal. *Corporeal* property consists wholly of substantial and permanent subjects, all which may be comprehended under the general denomination of land; which Lord Coke says, in its legal signification, comprehends any ground, soil or earth whatsoever; as meadows, pastures, woods, waters, marshes, furzes, and heath. It has also in its legal signification an indefinite extent, upwards as well as downwards; for it is a maxim of law that *cujus est solum, ejus est usque ad coelum.*" (1 Greenleaf's Cruise on Real Prop., 37 (46).)

A particular reference to the judicial decisions on this subject would be superfluous. There can be no debatable question that the word "lands," used in the third section of the railroad company's charter, is broad enough to include lands of the State covered by water. That is the legal signification of the word, and when it is contended that the word is there used in a less extended sense, it is incumbent on the disputant to point out

something in the context or in the subject-matter which satisfies the judicial mind that it is necessary to reject the plain, legal meaning of the language used in order to give effect to the real intention of the legislature.

There is nothing in the context which necessarily creates any ambiguity; nor are there any external or historical facts which suggest that the language used in making the grant, in the sense here attributed to it, does not express with entire precision the legislative intention. The construction of the railroad was regarded as an object of superlative importance to the State, and it was the evident intention of the legislature to put into the hands of the company the necessary means at its disposal to complete the enterprise and accomplish the purpose for which the work was undertaken. The State was not only vitally interested in the construction of the road, but it was to share permanently in the revenues to be derived from the operation of the road after its completion. Every intendment should therefore be made in favor of the company in order to give full effect to the grant. That such was the veritable intention of the legislature, is made incontestably manifest by that provision contained in the charter, that the act should be "favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever."

The railroad was located by the company pursuant to the authority conferred by the charter. The location within the City of Chicago was made, necessarily, in conformity to the provisions of an ordinance passed by the common council, which required that the right of way, for more than a mile, and the depot grounds of the company should be located on the land of the State then covered by the shallow waters of the lake. The ordinance also required that the road should enter the city "at or near the intersection of its southern boundary with Lake Michigan." In order to comply with this mandate, it was found necessary to lay out the line for some distance below the southern boundary of the city (then Twenty-second street) along the margin of the lake. No objection to that

location was made by the public authorities, either State or municipal, or by anybody. The company acquired the title in fee simple to substantially all the land on the shore of the lake required for the tracks, and the railroad was there constructed.

This was in 1852—forty-seven years ago—when the population of Chicago is reported to have been not quite 39,000. By the census of 1850 the number was 28,269, and the entire population of Cook County was only 43,385. The whole number of inhabitants in all the counties of the State through or into which the road runs (thirty-one in all), according to the same census, was 186,433, and the entire population of the State was 851,470.

There is no fact or circumstance that can be pointed to in the situation existing in 1850, and nothing in the previous legislation of the State, tending to raise the slightest presumption that the legislature, if their attention had been directed to the precise point, would have deemed it necessary or wise to exclude from the grant made in the third section of the charter such small pieces of land covered by the shallow water of the lake adjacent to the railroad, as might be actually needed for the construction, maintenance or successful operation of the road. The appropriation of such parcels for necessary railway purposes could be no impairment of the public right of navigation, and the land had no intrinsic value. There is, therefore, we repeat, no rational ground for the belief that the legislature would have been restrained by any considerations of wisdom or policy to restrict the grant to lands not covered by water, even were it allowable, on conjectural grounds only, to depart from the plain language of a statute which has acquired at common law a settled meaning and is free from ambiguity.

The State court *concedes* in its opinion, that the first clause of section 3 of the charter conferred upon the company the right to take for *right of way* a strip of land 200 feet wide in the lake, upon the location of its line in 1852; but that fact, it is said, "has no bearing on the question involved here." As to

the land taken for right of way, the court say, "there has been no controversy from any quarter." This concession, in view of a previous decision of the same court made in 1853 and the action under it, to which attention will be more particularly called presently, could hardly have been avoided. But if the grant in the third section is broad enough to permit the company to take land in the lake for its right of way, how can it be consistently held that land so situated may not also be taken for depots, engine-houses and other buildings necessary for the successful operation of the road?

It will be observed that the grant is not confined to a right of way 200 feet in width. In the first clause of section 3, there is granted to the company the right "to appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length"; but the very next clause, part of the same sentence, authorizes the company, in explicit terms, "to enter upon and take possession of any lands, etc., for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, station grounds, spoil banks, turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, *altering, maintaining, preserving and complete operation of said road.*" This is followed by the formal granting clause: *"All such lands*, etc., belonging to the State are hereby granted to said corporation for said purposes." By what rule of interpretation, it may be pertinently asked, is it permissible to give one signification to the word "land" in the first clause of the section, and a narrower one to the same word in the second clause of the same sentence?

It will also be observed that the right of the company to appropriate to its use the lands of the State, is co-extensive with the power conferred in the same section of the charter to acquire by purchase or condemnation the land of private owners. The latter, it is thoroughly settled, is a continuing power which may be exercised from time to time as the necessities of the company may require. (*Chi. & W. I. R. R. Co.* v. *Ill. C.*

R. R. Co., 113 Ills., 156; *Fisher* v. *Chi. & Springfield R. R. Co.*, 104 Ills., 323; *Railroad Company* v. *Wilson*, 17 Ills., 123; *N. Y. and H. R. R. Co.* v. *Kip*, 46 N. Y., 546; Lewis on Eminent Domain, Sec. 259.)

The public have an interest in the use of a railroad, and in its being kept continuously in efficient condition to render the service required of it. If, in consequence of the growth and development of the country along its line, additional facilities are required for the transaction of its business, it is the duty of the company to supply them. It is obviously impossible for the directors of the company to foresee at the outset what quantity of land will be required at different places along its line for the proper performance of its public duties; and the law does not require that lands sought to be taken *in invitum* shall all be acquired before the road is opened for use.

But in this case the right is not left to construction or inference. Authority is conferred in express terms, to enter upon and take possession of all and singular any lands necessary for the *"construction, completing, altering, maintaining, preserving and complete operation of said road."* There is no limitation as to the time when, or the number of times, the power may be exercised. And the charter is still the law of the State. It remains in full force. No attempt has been made to repeal it or to restrain by subsequent legislation the exercise of the power to enter upon and use the lands of the State, not otherwise appropriated, for the authorized purposes.

That the land in question is actually needed for an authorized purpose is not denied by the city. The purpose is stated in the original bill. The land is required for an engine-house, and the facts showing an urgent necessity for the use of the land for that purpose are also stated in detail. It was stipulated by the parties at the hearing of the case in the court of original jurisdiction, that all the allegations of fact set forth in the bill shall be taken and considered as true. Among the facts stated are these: That the company "has no engine-house whatever in the City of Chicago at which it is practi-

cable for its engines to be overhauled and fitted for operation"; nor has it "any land whatever unoccupied by other necessary tracks and structures which is either sufficient in dimensions or suitably located, upon which to construct an engine-house of the necessary dimensions and capacity."

The land sought to be taken for the engine-house is of no value for purposes of navigation. In its present condition it is utterly useless to the State, or the public, for any purpose whatever. The fact is alleged in the bill, and is admitted by the stipulation, that the exterior breakwater or bulkhead "does not in any way whatever interfere with or impair the navigation of Lake Michigan, and that it is not located within the limits, and is not a part, of the harbor of the City of Chicago." It is furthermore stated in the official permit obtained in 1897 from the Secretary of War, that this question had been referred to the local engineer officer, and that he had reported "that the proposed work will in no way affect the general navigation of Lake Michigan or of Chicago harbor."

Much importance is attached in the opinion of the State court to the use of the word "streams" in section 3 of the charter. "If the legislature intended by the use of the word 'lands' to include lands covered by water, why," it is asked, "also use the word *streams*"?

The question is purely speculative, and no positive answer can be given to it. Legislative bills are not always drawn by practiced draftsmen, and, when they are, words are frequently interpolated by many different hands not skilled in the choice of apt words to convey the precise meaning. Most words in the English language are more or less elastic, and it frequently becomes necessary to adapt the meaning of a particular expression to that which best suits the scope and object of the statute. (Endlich on the Interpretation of Stat., Sec. 295, and cases there cited.) It is often necessary in the exposition of legislative enactments and legal instruments to have recourse to the rules which are furnished by the common law to relieve

the inadequacy of literal interpretation. To adhere rigidly to the literal meaning would have the effect in some cases to pervert the real meaning.

The inference drawn by the State court from the use of the word "streams" is wholly *conjectural*, and it can be easily shown that the guess is very wide of the mark. Had the legislature intended to restrict the meaning of the word "lands" to lands not covered by water, can it be rationally supposed that they would have resorted to so inapt and equivocal a mode of signifying the intention? There is nothing in the context to indicate that the word "streams" was inserted for the purpose of *abridging* the grant. It is perfectly manifest, on the contrary, that the word was added for the very different purpose of making it clear that no restriction was intended. It is impossible to deny that the legislative intention manifested in section 3 was to place in the hands of the company both the lands and waters belonging to the State, not appropriated to other uses, which were reasonably necessary for the construction, maintenance and operation of the railroad. The word *streams* is not a technical word like "lands," and it is capable of being used in more senses than one. According to familiar rules of interpretation, it may be read in a more extended sense than its literal import, if that should be necessary in order to give a sensible and intelligent effect to the general purpose of the statute.

It is well known by all familiar with the jurisprudence of the State that there are no streams in Illinois, if the word be taken in its literal sense, strictly belonging to the State. It has been uniformly held since the decision in *Middleton* v. *Pritchard*, 3 Scam., 510, that the title to the soil under all the navigable rivers in the State is vested in the riparian owners. Rivers above tide-water, although navigable in fact, are not deemed navigable in law, and the question of ownership in the river-bed is decided in accordance with the ancient principles of the common law. (Gould on Waters, Sec. 69.)

Since, then, the State had no property in the beds of running rivers, rivulets or brooks, and as the express language of

the granting clause is, "All such lands, waters, materials and privileges *belonging to the State* are granted to said corporation for said purposes," the inference is not unreasonable nor far-fetched that the word "streams" was used in a broad sense to cover any waters in which the State had a proprietary interest.

But, as before intimated, the question is speculative, and not material. The statute uses the word *lands,* and nothing appears in the use of the accompanying word "streams," nor anywhere in the context, having any tendency to show that the word was not employed in its comprehensive, legal signification. Among the rules enacted in the Revised Statutes of the State to be observed in the construction of all statutes, is the following:

> "All general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried out." (Rev. Stat., Chap. 131, Sec. 1.)

In the case cited below it was decided by the Supreme Court of Connecticut, that *highways* or *streets* are "lands" within the meaning of a general statute authorizing railroad companies to change the location of their roads, and take lands for additional tracks, depots, *etc.* It is said in the opinion of the court:

> "When the statute uses the word 'land' in granting to a railroad company the power to exercise the right of eminent domain, it will be presumed to use it in its comprehensive sense, as including all interests attached to it or growing out of it; especially is this so if otherwise the rights granted would be inadequate or incomplete." (*State* v. *R. R. Commissioners,* 15 Atl. Rep., 756, 758.)

The precise question involved in this case has been passed upon by the Supreme Court of Iowa. It was provided by a general statute in that State that "any railroad corporation shall be authorized to pass over, occupy and enjoy without pay-

ment of damages, any of the school, university, and saline or other *lands* of this State; provided, no more of such lands shall be taken than is required for the necessary use and convenience of such corporation." Railroads were constructed by two different companies across a bend in the Des Moines river, on land below high-water mark. The title to the river-bed was in the State; and it was held that the railroads were "lawfully constructed upon the public lands of the State." (*C., B. & Q. R. R. Co.* v. *Porter Bros.*, 72 Ia., 426.)

Another singular position is assumed in the opinion of the State court to the effect, that even if the grant in the company's charter is broad enough to include land covered by the shallow water of Lake Michigan, the grant was ineffectual, because in making the grant the State transcended its authority. The authority relied upon to sustain this position is *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S., 387.

The controversy in that case related to lands situated on the border of Lake Michigan, between the mouth of the Chicago river and Sixteenth street, which had been reclaimed from the lake and occupied by the railroad company for railroad purposes; and to the title claimed by the company, under an act of the legislature passed in 1869, to a large tract of submerged land adjacent to the railroad, north of Sixteenth street. This tract embraced upwards of 1,000 acres, and included the whole of the outer harbor. The right of the company to retain possession of all the lands which had been actually occupied for railroad purposes, was confirmed by the court; but as to the large tract of submerged lands ceded by the act of 1869 it was held that the grant was revocable, and that having been revoked by a subsequent act passed in 1873, the title had been restored to the State, and the grant of 1869 was no longer effective. It was declared to be incompetent for the legislature to deprive the State of its ownership of the submerged lands in the harbor of Chicago, and place them in the hands of a private corporation beyond any future exercise of power over them by the State.

It was, however, conceded, and expressly decided, that there is no valid objection to grants by the State of small parcels of land under navigable waters, which do not substantially impair the public interest in the lands and waters remaining. A distinction was drawn between such grants and the cession of an entire harbor. Grants of such small parcels, it was said, are sustained in the adjudged cases as a valid exercise of legislative power; but that was declared to be a very different doctrine from one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay. "Such abdication," it was said, "is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."

This is substantially all that was decided in the case referred to, so far as the decision has any bearing upon questions involved in the present controversy. It requires only a careful reading of the opinion to show that the State court has entirely misapprehended the effect of the decision, and that, instead of announcing the doctrine attributed to it in the State court, it adjudges precisely the contrary.

This mistake is the more remarkable, when what is now said is compared with what was said by the same court on the same subject only two years before. In 1889 an act was passed by the legislature giving authority to any board of park commissioners having control of any boulevard or driveway connecting with any public park under the control of such board, which bordered upon any public waters in the State, to extend such boulevard or driveway, of the width of not more than 200 feet, over and upon the bed of such public waters; provided that no such extension should be made "in such manner as to interfere with the navigation of such public waters for the purposes of commerce." The act also contained this further provision:

"In all cases where any boulevard or driveway is extended

> under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby."

Acting under the provisions of this act, the commissioners of Lincoln Park in Chicago surveyed and located a driveway over and upon Lake Michigan, in such manner that ninety-three acres of submerged land lay between the outer line of the driveway and the shore of the lake. That portion of this large tract lying between the driveway and the shore (more than nine-tenths of the whole) was divided into parcels and sold to the shore owners, each shore owner obtaining that portion of the land lying opposite to the premises owned by him. In consideration of the sale, the shore owners agreed to construct the driveway in the lake and fill in the submerged land between the driveway and the shore, and also to pay the commissioners $100 for each lineal foot of their respective frontages upon the lake. An information was brought by the attorney general to annul these contracts and compel the filling already done under the contracts to be removed. It was contended on behalf of the complainant that the legislature had no power to alienate the lands under the waters of Lake Michigan as proposed by the act of 1889, and that such lands could be disposed of by the State only in aid of trade, commerce and navigation.

It was decided by the court that the act of 1889 was a valid exercise of legislative power, and that there was no legal or constitutional objection to the reclamation of the submerged lands or to the disposal which had been made of them by the commissioners.

It is said in the opinion of the court to be well settled, that

the title to lands covered by the waters of Lake Michigan within the boundaries of the State is vested in the State; but that the fee is held in trust for the public, and that the governmental powers of the State over these lands cannot be relinquished. Reference is made to the decision in *Illinois Central Railroad Company* v. *Illinois,* 146 U. S., 387, and the doctrine announced in that case is treated as sound. But did the State (asks the court) repudiate the trust and transcend its powers in the enactment of 1889? The question, it is said, is not one of policy or expediency, but one of power. "Was the legislature clothed with power to convey reclaimed lands which were originally covered by the waters of Lake Michigan"? This is followed by the following paragraph:

> "*In Illinois Central Railroad Co.* v. *Illinois, supra,* in speaking of this question of power, the court said: 'The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in the instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.' In the case cited the court recognizes the power of the State to convey parcels of the lands held by the State under navigable waters when such conveyances will not impair the public interest in the lands and waters remaining."

Further on in the same opinion the conclusion reached by the court is announced as follows:

> "Under the authorities the law seems to be well settled that the legislature was clothed with power to enact a law authorizing the extension of the driveway over and upon the waters of the lake, so long as the extension did not interfere with navigation, commerce and the right of fishery upon the lake, and we see no reason why the submerged lands reclaimed by the extension of the driveway may not, as provided in the act, be appropriated for the payment of the improvement. The

legislature represents not only the State, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held, and in that capacity possesses the sovereign power of parliament over the waters of the lake and the submerged lands covered by the waters. In providing for the construction of the drive over and upon the shoal waters of the lake and placing the control in the hands of the park commissioners for park purposes, no attempt has been made by the legislature to relinquish its governmental powers or place them beyond the power of future legislation." (*The People* v. *Kirk*, 162 Ill., 138.)

A glaring discrepancy between these two decisions is manifest. If it is competent for the State to dispose of ninety-three acres of land in the lake for the purpose of constructing a driveway intended only for pleasure travel, it is hard to understand why much more insignificant parcels may not be granted by the legislature to aid in the construction and improvement of a great agency of commerce, in which the State of Illinois has so large an interest as it has in the Illinois Central Railroad.

II. The construction put upon the statute in the State court in the case under review, is contrary to the interpretation publicly placed upon it at the time of its enactment by the directors of the company and by the public authorities, whose duty it was to construe, execute and apply it.

The persons constituting the first board of directors were named in the charter. Many of them were men of unusual intelligence and ability, whose names will doubtless be well remembered by some of the justices of this court. The board consisted (Sec. 6) of Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, Jr., Jonathan Sturges, George W. Ludlow, John F. A. Sandford, Henry Grinnell, Joseph W. Alsop, Leroy Wiley and the governor of the State. The governor of the State was made a director perpetually, *ex-officio*. (Sec. 5.)

One of the first duties requiring the attention of the board was the location of the road; and the location could be made within the City of Chicago only with the consent of the common council. That consent was obtained by an ordinance passed June 14, 1852, which forms part of the record in *Illinois Central Railroad Company* v. *Illinois*, 146 U. S., 387, and also of the record in a most pertinent and decisive case in the State court presently to be brought to the notice of this court.

The ordinance provided (Sec. 1) that the road should enter the city

> "at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, continue northerly across the open space in front of said section fifteen to such grounds as the company may acquire between the north line of Randolph street and the Chicago river, in the Fort Dearborn Addition to said city, upon which said grounds shall be located the depot of said railroad within the city, and such other buildings, slips or apparatus as may be necessary and convenient for the business of said company."

The strip of ground designated in the ordinance for the location of the railroad between the southern boundary of Lake Park and the north line of Randolph street—a distance exceeding one mile—was then covered by the waters of the lake. The land to be reclaimed from the lake for the depot grounds, etc., between Randolph street and the river, embraced an area of some thirty acres.

The railroad was located by the board of directors and built as prescribed by the ordinance, and the land in the lake designated for the location of the depot and other buildings was reclaimed and occupied by the company.

It has never been pretended that the city had any title to or proprietary interest in the land covered by the water of the lake. That land belonged to the State. The *ordinance*, therefore, conferred no right upon the company to take possession

of and appropriate it. The city had no more authority to make a grant of land forming part of the bed of the lake than it had to dispose of the land of private owners upon the shore; and care was taken to guard the city against any inference or implication that it had assumed any such authority by inserting in the ordinance the provision:

> "But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company."

The city could say where the railroad should be located. No part of the land within the location, as made, belonged to the city. Some of it belonged to private owners, and the rest belonged to the State. As to the latter, it was assumed both by the directors and by the municipal authorities that the right to appropriate it was conferred by the company's charter. The right so acquired, as will presently be seen, was soon afterwards affirmed by the Supreme Court of the State; and the company has ever since remained in the undisturbed possession of the land occupied. In repeated instances after the original location was made, as shown in *Illinois Central Railroad Company* v. *Illinois, supra,* sometimes with, but for the most part without, the formal consent of the city council, additional small parcels of land adjacent to the road were reclaimed from the lake and occupied by the company as its necessities required.

The contemporaneous construction thus put upon the grant made in the third section of the company's charter cannot be disregarded except for cogent reasons. "It is said," according to Endlich—the author of a judicious and instructive work on the Interpretation of Statutes—"that the best exposition of a statute or any other document is that which it has received from contemporary authority." Even if the language be obscure, instead of being clear, the understanding of it when the statute first went into effect, if publicly acted on, especially

when sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is presumed to be the true one. (Endlich on the Interpretation of Statutes, §§ 357, 358, and cases there cited; 23 Am. and Eng. Ency. of Law, 339.) Moreover, the doctrine is well settled, that, in order to understand the scope and meaning of an enactment, the court will take judicial notice of contemporaneous history and of the construction put upon the enactment by long and notorious usage. (Endlich on the Interpretation of Stat., § 29, and cases there cited.)

III. The construction now placed upon the statute by the State court is diametrically opposed to that judicially announced and acted upon by the same court in 1853, immediately after the railroad was originally located.

In acquiring the lands designated in the ordinance for the location of depots, etc., situated between Randolph street and the river, it became necessary to resort to condemnation proceedings, and a petition was filed in the County Court for the appointment of appraisers to assess the damages which would be sustained by the owners of the land upon the shore of the lake proposed to be taken. Objections were made to the application and the judge of the County Court refused to entertain the petition. Application was then made by the company directly to the Supreme Court for a mandamus to compel the county judge to proceed with the case and appoint appraisers. It appears from the original record of the case in the Supreme Court (an exemplified copy of which has been filed in this court), that the object of the proceeding in the County Court was to condemn not only parts of the lots of land on the shore belonging to the several lot owners, which were contiguous to the lake, but also all the right, title and interest such owners might have in the land under the lake, in front of their respective lots, which was included within the area proposed to be filled in and reclaimed, as contemplated in the ordinance of the common council. It

also appears from the same record that the ordinance of June 14, 1852, was introduced in evidence, and the ordinance is there set forth at length.

It was contended by counsel for the lot owners (as shown in the published report of the case), that the premises in question were parcel of the harbor of Chicago, and that the company had no right to enter upon and occupy any portion of the bed of Lake Michigan. For the railroad Company it was contended, that the bed of Lake Michigan belonged to the State of Illinois, and that "the State had, by the express words of the charter, given the railroad company the authority to locate their road over the bed and in the waters of the lake."

The case being considered one of urgent importance, the decision of the court was announced without assigning the reasons for it. It was *held,* that the company "has the right *by its charter* to locate the road over the premises in question, the City of Chicago having assented," and that it was the duty of "the defendant to appoint appraisers, according to the prayer of the petition." A peremptory mandamus was, therefore, awarded. (*Illinois Central Railroad Company* v. *Rucker,* 14 Ills., 353.)

The court was composed at that time of the following judges: Samuel H. Treat, Chief Justice (afterwards, for many years, judge of the United States District Court for the Southern District of Illinois), John D. Caton and Lyman Trumbull.

It is said by the State court in the present case, that it does not regard the above adjudication "as one having a bearing on the question presented by this record." "It appears," says the court, "that no question was raised or decided, as we understand the case, in regard to the right of the railroad company to go beyond the 200 feet granted and selected for right of way and take lands covered by the waters of the lake for an engine-house or for other railroad purposes named in the charter."

In this it is apparent that the court was egregiously misled and utterly failed to understand the gist of the former decision.

The land sought to be condemned in that case was all north of Randolph street, and it was condemned, not for "right of way," but, as shown by the record, "*for the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs, and other buildings and erections necessary for the construction and complete operation of the said road.*" The right of way terminated at Randolph street, and so far as it was located in the waters of the lake, lay in front of the public grounds upon the shore. No private interests were affected by that location. The *only* question directly in controversy was as to the right of the company to appropriate land upon the shore of the lake, and in the waters in front of it, for its *depots, station grounds, engine houses, etc.*, as contemplated in the first section of the ordinance hereinbefore referred to; and the decision of the court distinctly was that the company had that right *by its charter.*

But if the understanding acted upon by the court were correct, instead of being palpably erroneous, the opinion expressed in its decision, that the case had no "bearing on the question presented by this record," would be scarcely less unsound and illogical. If the charter conferred the right to appropriate for *right of way* land of the State forming part of the bed of the lake, which is conceded by the State court, how can it be consistently urged that it did not also confer the right to take other land, similarly situated, for other necessary purposes? That question has been sufficiently discussed in a former part of this brief, and there can be no doubt as to the answer which must be made to it.

We say, then, that the construction put upon the language of the third section of the charter by the directors of the company and by the municipal authorities has been sanctioned by a judicial decision which ought to be accepted as conclusive. Under that construction property rights have been acquired; the judicial interpretation has been followed by long usage, and a reversal of the decision would be in practical effect the same as a change in the statute. (Sutherland on Stat. Construction, §§ 312-319, and cases there cited.)

IV. The construction now put upon the statute by the State court is repugnant to the construction sanctioned and acted upon by the legislature in a public act passed in 1869.

The act referred to has been the subject of much consideration in the Circuit Court of the United States for the Northern District of Illinois, and also in this court. It is the statute referred to on page 18 of this brief. The act is entitled, "An Act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago," and was passed April 16, 1869.

The act contained this clause:

> "SEC. 3. The right of the Illinois Central Railroad Company, *under the grant from the State in its charter,* which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed."

This is followed by a clause making a further extensive grant to the company covering the submerged lands now included within the outer harbor. (Public Laws of Ills., 1869, p. 246.)

The right of the company, *under the grant from the State in its charter,* to enter upon and appropriate lands covered by the waters of the lake, which were needed for its road, is clearly recognized in the clause above quoted. We have, therefore, not merely long acquiescence on the part of the legislature in the contemporaneous understanding of the language used in section 3 of the company's charter, and in the practical application which had been made of it prior to 1869—that is, during

a period of eighteen years,—but we have what is equivalent to an express legislative declaration that the language was used in the sense which had been attributed to it.

V. The new construction announced by the State court is in direct conflict with the well considered judgment of the Circuit Court of the United States for the Northern District of Illinois in a former suit brought by the State against the railroad company, involving, with other issues, the precise legal question now under discussion, which judgment was afterwards affirmed by this court.

In 1883 an information in equity was filed by the attorney general, in the name of the People of the State of Illinois, against the Illinois Central Railroad Company, in one of the State courts in Chicago, in which complaint was made, among other things, that the railroad company claimed the right, under its charter, to fill in and occupy the bed of Lake Michigan in front of fractional sections 10 and 15 in Chicago (lying between the river and Twelfth street), and under color thereof had made encroachments on the domain of the State by entering upon the bed of the lake in front of those sections, and filling in portions thereof and appropriating the same to its own use for railroad purposes. It was alleged that the claims made by the railroad company were unfounded, and the court was asked "to adjust and determine the title to the portion of the lake in question, and to limit and determine the rights therein of the Illinois Central Railroad Company." The relief prayed for was, in part, "that the structures and erections, all filling, piling and crib-work and pier constructions made by the Illinois Central Railroad Company upon or in the said domain of the State may be directed to be removed and such domain restored to the condition in which it was before such constructions were made."

In the answer to the information filed by the railroad company, the grants made by the State to the company in its charter were set forth in substance, and also the permission given

by the city ordinance of June 14, 1852, to locate the railroad tracks within the city of Chicago. The answer also contained the following admissions and averments: That the company, having become the owner of all the land on the shore between Randolph street and the river, had filled in a portion of the bed of the lake in front of it, and was occupying the same for railroad purposes; that its railroad had been constructed within the city upon the route designated in the ordinance, and that afterwards several small parcels of land south of Randolph street, adjacent to the right of way, had been reclaimed from the lake and occupied by the company; and that the respondent had begun and was then prosecuting the work of filling with earth a portion of what had been the bed of the lake, between Twelfth street and Sixteenth street, but that it was the owner of all the ground bordering on the lake at the points where such work was in progress. With reference to all these constructions, it was alleged that they were necessary for the maintenance and complete operation of the railroad; that they did not extend into the lake to the detriment of navigation, and that the company claimed title to all the land which had been thus appropriated, and the right to the possession and use of the same, under and by virtue of the grants made in its charter.

The respondent also asserted title to the land so occupied under and by virtue of the grants made in the legislative act of April 16, 1869, referred to on page 28 *ante;* and it was further averred that, relying upon the provisions of said act, the respondent had, from time to time, after the passage and before the attempted repeal thereof, and before the filing of the original information in that cause, entered upon, reclaimed and reduced to profitable use considerable portions of the submerged lands thereby granted, and in so doing had made large expenditures.

The case was removed from the State court into the Circuit Court of the United States at Chicago on the petition of the respondent, and came on for final hearing upon the pleadings

and proofs at the July term, 1887, before Mr. Justice Harlan and Hon. Henry W. Blodgett, District Judge. The opinion of the court was delivered by Mr. Justice Harlan, and a final decree was entered September 24, 1888, in conformity to the opinion.

It was *held,* that the charter of the railroad company granted to it the right to take and use all such lands and waters belonging to the State as were necessary to the construction and complete operation of its road, provided such use did not interrupt the navigation of the waters; and that, under the showing made, there was no basis for a decree declaring the structures complained of to be illegal,—such structures appearing from the evidence to have been required by the growing business of the company, and therefore necessary for "the complete operation of the road," and it not appearing that such use of the waters of the lake materially obstructed navigation. (*State of Illinois* v. *Illinois Central Railroad Co.,* 33 Fed. Rep., 730.)

It was adjudged in the decree, that the railroad company was entitled to retain the possession of all the constructions complained of which it had made in the lake; that they were lawful structures and not encroachments upon the domain of the State of Illinois, but with respect to the large tract of submerged land granted in the act of April 16, 1869, that the repeal of that act in 1873 had the effect in law to re-invest the State with the same right and title in the premises that it had prior to the passage of the act of 1869, saving, however, to the railroad company, as unaffected by the repeal, the right to hold and use so much of the tract as it had reclaimed from the lake and was in possession of.

Upon the hearing of the appeal from that decree in the Supreme Court, the decree was modified in one or two particulars, not affecting, however, in the slightest degree any question involved in the present controversy. The court was not satisfied from the evidence that the three piers which had been constructed between the Chicago river and Randolph street,

and the pier and docks between and in front of Twelfth and Sixteenth streets, did not extend into the lake beyond the line of navigability, and it was ordered that the case be remanded to the Circuit Court with directions to order such investigation to be made as would enable it to determine whether those works did not extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, and, if it should be determined that they did not extend beyond such point, to affirm the title and possession of the railroad company. Except as modified in those particulars, the decree of the Circuit Court was affirmed. (*Illinois Central Railroad Co.* v. *Illinois,* 146 U. S., 387.)

The result of the investigation made by the Circuit Court pursuant to the mandate of the Supreme Court is shown in *People of State of Illinois* v. *Illinois Central Railroad Co.,* 91 Fed. Rep., 955.

With reference to the judgment of the Circuit Court in the original case (33 Fed. Rep., 730), it is said in the opinion of this court (146 U. S., 434):

> "We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion (33 Fed. Rep., 730), for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy."

This commendation of the extraordinary pains taken in the Circuit Court to elucidate the facts, which were complicated and exceedingly voluminous, and to investigate the principles of law applicable was fully merited. The reported cases are rare, in which more painstaking and conscientious labor is

shown to have been undertaken by a court to reach correct conclusions upon the law and the facts.

These two decisions are referred to in the opinion of the State court in the case under review, but they appear to have received no attentive consideration. All that is said is:

> "There may be found expressions in the opinion of the Supreme Court which might seem to favor the view of appellant, but when the facts of that case are taken into consideration and the entire opinion is examined we do not think that the case lends support to the position of appellant in this case."

The point seems to have wholly escaped observation, that it was distinctly decided by the Circuit Court that the right was conferred upon the railroad company *by its charter* to take and use all such lands covered by the shallow waters of Lake Michigan, belonging to the State, as were necessary to the construction and complete operation of its railroad, provided such use did not materially interfere with the public right of navigation, and that the judgment of the Circuit Court had been affirmed in this court. We must be pardoned for thinking that those cases (to which the City of Chicago was a party) *do* "lend support" to the position taken by the appellant in the State court. And, sustained, as the conclusion reached by the Federal courts is, by the contemporaneous construction put upon the charter, and by the former judgment of the State Supreme Court, followed by the concordant interpretation subsequently adopted and acted upon by the State legislature, it is respectfully submitted, that it is but reasonable and just that that conclusion should be accepted as final by all the parties.

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